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# Information

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## Summary

Jean Ryan, complainant, Canadian Union of Public Employees, Local 2365, respondent, and Lax Kw'alaams Band Council, employer.

Board File: 745-4322  
Decision no. 1032

Complaint alleging violation of section 37 of the Canada Labour Code, Part I.

Unfair labour practice. Duty of fair representation. Dismissal. At a general meeting, the membership voted against referring the complainant's grievance to arbitration.

The Board concluded that a union must seriously examine a grievance and a case before making a determination concerning arbitration no matter which authority or person makes the decision. In this case, the Board found that the union had breached its duty when the membership made its determination, at the general meeting, without having received all relevant information.

## Résumé

Jean Ryan, plaignante, Syndicat canadien de la Fonction publique, section locale 2365, intimé, et Lax Kw'alaams Band Council, employeur.

Dossier du Conseil: 745-4322  
Décision n° 1032

Plainte alléguant violation de l'article 37 du Code canadien du travail, Partie I.

Pratique déloyale de travail. Devoir de représentation juste. Congédiement. Les membres du syndicat réunis en assemblée générale ont voté de ne pas renvoyer le grief de la plaignante à l'arbitrage.

Le Conseil conclut que l'obligation du syndicat d'étudier sérieusement un grief et un dossier avant de prendre une décision concernant l'arbitrage s'applique quelle que soit l'instance ou la personne qui prend la décision. En l'espèce, le Conseil décide que le syndicat a manqué à son devoir lorsque l'assemblée générale a décidé sans que toute l'information pertinente lui ait été transmise.



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Travail

Reasons for decision

Jean Ryan,

complainant,

and

Canadian Union of Public  
Employees, Local 2365,

respondent,

and

Lax Kw'alaams Band Council,  
employer.

Board File: 745-4322

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The Board was composed of Mr. J. Philippe Morneault, Vice-Chairman, and Ms. Evelyn Bourassa and Ms. Ginette Gosselin, Members.

Appearances

Mr. Bill Ostenstad, for the complainant;

Mr. Rick Coleman and Ms. Mary-Lou Warren, for the Canadian Union of Public Employees, Local 2365; and

Messrs. William Hibbard and Shawn MacDonald, for the employer.

These reasons for decision were written by Ms. Ginette Gosselin, Member.

I

This case involves a complaint filed by Jean Ryan pursuant to section 97(1) of the Canada Labour Code. In her complaint, Ms. Ryan alleges that her union, Local 2365 of the Canadian Union of Public Employees (CUPE), violated in various ways section 37 of the Code. She is asking the Board to order the union to refer her dismissal grievance to arbitration.

Ms. Ryan, a capital projects officer in the employ of the Lax Kw'alaams Band Council since 1986, was dismissed on

August 12, 1992. On September 10, she filed a complaint with the Board, alleging, among other things, that the union had not observed certain grievance procedure time limits specified in the collective agreement. A labour relations officer was assigned to the case, in accordance with the Board's standard practice, to investigate the complaint and assist the parties in reaching a settlement. On February 5, 1993, in a letter to the Board, Ms. Ryan reiterated her complaint, adding new information to it, and again asked the Board to dispose of it. The officer submitted his report to the Board after it had received this second request from Ms. Ryan.

The Board held a hearing on June 9 and 10, 1993 in Prince Rupert, British Columbia.

II

CUPE Local 2365 represents band council employees in Port Simpson, a small community in northern British Columbia. This CUPE unit is comprised of slightly more than 20 members. The local executive also serves as the grievance committee and is assisted and advised in these functions by a national CUPE representative, i.e. Mary-Lou Warren, the national representative, whose office is in Terrace, British Columbia. CUPE locals are autonomous and have the authority to decide whether a grievance will be referred to arbitration. In Port Simpson, this decision is made by the membership at a general meeting. If necessary, CUPE assists a local in paying arbitration costs.

Ms. Ryan, as we said, was dismissed on August 12, 1992. The very next day, she filed a grievance to contest her dismissal. She had a copy of the grievance, along with her version of the facts and her reply to the employer's allegations, sent to the only member of the executive

present in the work place that day. The complainant did not try to communicate in any other way with the local representatives either that day, in the ensuing days, or during the whole period in question, nor did the local representatives try to communicate with her. Immediately following her dismissal, the complainant chose instead to contact CUPE's regional office in Terrace. Someone advised her in Ms. Warren's absence. On her return from holidays, Ms. Warren examined the file, contacted the complainant and thereafter continuously advised and assisted her. She served as a kind of intermediary between Ms. Ryan and the local executive. Ms. Warren also assisted the local executive with the approaches it made to the employer with a view to settling the grievance.

On September 2, 1992, a meeting took place between the band council's representatives and the local executive. One of the matters discussed was Ms. Ryan's dismissal. Following this meeting, the executive, although questioning the merits of Ms. Ryan's grievance, forwarded to Ms. Warren all the documentation in its possession pertaining to the grievance in order to obtain her advice and assistance.

Three meetings concerning the grievance were subsequently held between the employer and the union. Ms. Warren attended all meetings. The complainant was unable to attend the final meeting. The first meeting having ended in failure, Ms. Warren informed the employer that the union was referring the grievance to arbitration. Discussions resumed, and at the third meeting in November, the employer proposed to pay Ms. Ryan four months' salary as a grievance settlement.

Ms. Warren told the complainant of this proposal. She also explained to her that, although she felt that the grievance was valid, particularly as regards procedural questions, she

could not guarantee that Ms. Ryan would win and suggested to her that she carefully consider the employer's offer. At the outset, Ms. Warren had given the local executive her opinion on the grievance.

As Ms. Warren had reminded them, the executive then had to refer the grievance to the membership at a general meeting for a decision concerning arbitration. This was the first time that the local had had to apply this procedure. To this end, two meetings were held on December 17, 1992. Ms. Ryan was informed on the eve of the afternoon meeting scheduled for 3:00 p.m. She did not know that another meeting was being held that morning for the "outside workers." When the complainant arrived at the appointed time, the meeting had already begun. Thirteen persons were in attendance. The president, Ms. Sherrie Haldane, invited her to present her case to her fellow members. Ms. Ryan told them of her wish to have the grievance referred to arbitration. The members then voted and the ballots were counted immediately. The envelope also contained the ballots of those who had voted that morning. By a large majority, the membership decided not to proceed to arbitration.

Ms. Haldane explained that she started the meeting before the complainant arrived as she was afraid, because of an incident that had occurred earlier in Port Simpson, that the other members would refuse to discuss the matter in Ms. Ryan's presence. She said that a first meeting had been held in the morning to allow all members to vote on an important issue. Consequently, before the complainant arrived, Ms. Haldane related to the members present at the afternoon meeting the facts of the grievance, answered the few questions asked and made the file available to the members for consultation. The executive, which had always had doubts about the complainant's chances of success at

arbitration, made no recommendation to the meeting because, according to Ms. Haldane, it did not want to influence the membership. Nor did it inform the meeting of CUPE's program to assist the locals in paying the arbitration costs, if necessary, or of Ms. Warren's opinion regarding the outcome of the grievance. Vera Dudoward, a witness for the complainant who attended the afternoon meeting, stated that everything went well, that the meeting was conducted properly and that she had understood what was at stake. She voted for arbitration. Ms. Warren had been informed of the meetings, but had not attended because of other commitments.

Ms. Ryan thought briefly about challenging the vote because there was one more vote cast than the total number of people eligible to vote that day. Upon reflection, she decided not to do so.

### III

Section 37 provides the following:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

In Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509; (1984), 9 D.L.R. (4th) 641; and 84 CLLC 14,043, the Supreme Court of Canada summarized as follows the criteria for applying this section:

"The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.

1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all

employees comprised in the unit.

2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.

3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.

4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.

5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."

(pages 527; 654; and 12,188; emphasis added)

In Jacqueline Brideau (1986), 63 di 215; 12 CLRBR (NS) 245; and 86 CLLC 16,012 (CLRB no. 550), the Board echoed the terms "arbitrary", "discriminatory" and "bad faith" as defined by the British Columbia Labour Relations Board:

"(a) conduct which is arbitrary, i.e., conduct which disregards the interests of one or more of the employees by acting in a superficial or perfunctory manner;

(b) conduct which is discriminatory, i.e., unequal treatment based on factors such as race, religion, sex, or simple personal favouritism; and

(c) conduct actuated by bad faith, e.g., motivated by personal hostility, dishonesty or personal revenge."

(Josie M. Willock et al., no. L361/82, December 14, 1982, pages 3-4; reproduced at pages 232; 261; 14,104-14,105)

In the instant case, the complainant claimed that Local 2365 discriminated against her by excluding her from part of the meetings concerning her case, acted in bad faith by holding the vote in the manner described earlier and, finally, acted arbitrarily by not investigating her grievance seriously, by excluding her from its procedures and by not providing the

membership at the general meeting with the necessary information, in particular the reasons supporting reference to arbitration. We should make clear that these claims do not apply to Ms. Warren. The complainant is satisfied with her conduct.

Of all the claims the complainant makes against her union, the Board considers that only those relating to the meetings of December 17 possibly have merit. As for the remaining claims, i.e., the lack of communication between the local executive and the complainant, and the inadequate investigation, the Board considers that these failings are either largely the fault of the complainant herself, who never tried to contact the local persons responsible, or are mitigated by the work of Ms. Warren with whom the complainant expressed satisfaction and who cannot be considered a stranger to the Local. Ms. Warren did precisely what CUPE employs her to do, namely, assist the local representatives who often lack experience in performing their union duties.

There remains the question of the meetings of December 17. Do the exclusion of the complainant from the morning meeting and from part of the afternoon meeting and the absence of any discussion of the merits of the grievance constitute evidence of discrimination, arbitrariness or bad faith? As the Board has repeatedly said in numerous past decisions, and as the Supreme Court indicated in the above-cited case, did the union exercise its discretion after a thorough examination of the grievance? The obligation to conduct a thorough examination of a grievance and a case applies to each and every authority or person making the decision on the union's behalf. As the Board stated in M.A. Ladds (1991), 85 di 160; and 91 CLLC 16,054 (CLRB no. 879), even if it is difficult to establish what motivated the decision of a meeting of a group of persons, the circumstances

leading to this decision can be assessed.

There is no doubt that the local executive and Ms. Warren were very familiar with the case, but they did not make the decision. It was therefore necessary that all relevant information be provided to the membership at the meetings to enable them to make an enlightened decision. However, the evidence showed that the membership was not told of Ms. Warren's position or of CUPE's program to assist locals in paying the arbitration costs, if necessary. It also showed that the complainant could not present her case at the morning meeting and that she was put in a very awkward position to do so at the afternoon meeting. We cannot therefore conclude that the membership, the decision-making authority in this case, examined Ms. Ryan's case thoroughly. Consequently, the Board finds that CUPE Local 2365 acted arbitrarily when it made its decision on December 17, 1992, thereby violating section 37 of the Code.

Where the Board finds that there has been a contravention of section 37, it has the following powers under section 99 of the Code:

"99.(1) Where, under section 98, the Board determines that a party to a complaint has contravened or failed to comply with subsection 24(4) or 34(6) or section 37, 50, 69, 94, 95 or 96, the Board may, by order, require the party to comply with or cease contravening that subsection or section and may

...

(b) in respect of a contravention of section 37, require a trade union to take and carry on behalf of any employee affected by the contravention or to assist any such employee to take and carry on such action or proceeding as the Board considers that the union ought to have taken and carried on the employee's behalf or ought to have assisted the employee to take and carry on;

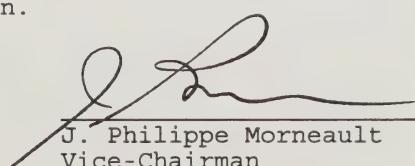
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(2) For the purpose of ensuring the fulfilment of the objectives of this Part, the Board may, in respect of any contravention of or failure to comply with any provision to which subsection (1)

applies and in addition to or in lieu of any other order that the Board is authorized to make under that subsection, by order, require an employer or a trade union to do or refrain from doing any thing that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of those objectives."

The complainant, as we have seen, is asking the Board to order the union to refer her grievance to arbitration. At the hearing, the union and the employer suggested that if the complaint were allowed, holding another vote would constitute an adequate remedy. After consideration, the Board concludes that the only effective remedy in the instant case that will finally resolve the dispute is to refer the grievance to arbitration.

The Board therefore orders CUPE Local 2365 to refer Ms. Ryan's grievance to arbitration, waives, if necessary, the time limits that apply to the grievance and arbitration procedures and retains jurisdiction to determine, if necessary, the share of compensation the union must pay if the grievance is allowed. Further, should the complainant so desire, she can be represented by counsel of her choosing for the purposes of the arbitration. The union will pay the cost of such representation.

  
J. Philippe Morneault  
Vice-Chairman

  
Evelyn Bourassa  
Member

  
Ginette Gosselin  
Member

ISSUED at Ottawa, this 28 day of September 1993.



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# Information

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## Résumé

Claude Lamoureux, requérant, VIA Rail Canada Inc., employeur, et André Bastien, agent de sécurité.

Dossier du Conseil: 950-250

Décision n°: 1033

Les présents motifs traitent d'une demande de renvoi d'une décision d'un agent de sécurité par suite du refus de travailler d'un employé de VIA Rail Canada Inc. Selon le requérant, la présence d'une voiture non attelée sur la même voie que la rame devant faire l'objet d'une inspection de sa part constituait une condition dangereuse.

Le Conseil traite d'une question préliminaire ayant trait aux délais à respecter dans les cas de demandes de renvoi.

Étant convaincu que toutes les mesures normales de sécurité avaient été prises et que la procédure des drapeaux bleus se conformait au Règlement unifié d'exploitation approuvé par Transport Canada, le Conseil a confirmé la décision de l'agent de sécurité selon laquelle il n'existe pas de danger au sens du Code.

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## Summary

Claude Lamoureux, applicant, VIA Rail Canada Inc., employer, and André Bastien, safety officer.

Board File: 950-250

Decision no. 1033

This decision deals with a referral of a safety officer decision, following the refusal to work by an employee of VIA Rail Canada Inc. According to the applicant, the presence of an uncoupled vehicle on the same track as the consist that he was to inspect constituted a dangerous situation.

The Board disposed of a preliminary question concerning the time limits to be observed in referral cases.

Satisfied that all the usual safety measures had been taken and that the blue flag procedure complied with the Uniform Code of Operating Rules approved by Transport Canada, the Board confirmed the safety officer's decision that there was no danger within the meaning of the Code.



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Reasons for decision

Claude Lamoureux,  
applicant,  
and  
VIA Rail Canada Inc.,  
employer.

Board File: 950-250

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The Board was composed of Ms. Evelyn Bourassa, Member, sitting as a single member pursuant to section 156(1) of the Canada Labour Code (Part II - Occupational Safety and Health).

Appearances

Mr. John Merritt, System Health & Safety Legislative Coordinator, CAW - Rail Div./Local 100, for the complainant; Ms. Anne Cartier, for the employer; and Mr. André Bastien, safety officer, Labour Canada.

I

This case involves the reference to the Canada Labour Relations Board, pursuant to section 129(5) of the Canada Labour Code (Part II - Occupational Safety and Health), of a decision of a safety officer. This reference is further to the decision of an employee, Claude Lamoureux, to exercise his right under section 128(1) of the Code to refuse to work in circumstances he considered dangerous and is further to the subsequent investigation by safety officer André Bastien.

In his report of November 19, 1992, Mr. Bastien confirmed the decision he communicated verbally to the employee on November 12, 1992, namely, that the work situation cited by Mr. Lamoureux did not constitute a danger within the meaning of the Code. In a letter dated December 2, 1992, the

applicant requested that the safety officer's decision be referred to the Board.

The above-mentioned provisions of Part II of the Code read as follows:

"129. (5) Where a safety officer decides that the use or operation of a machine or thing does not constitute a danger to an employee or that a condition does not exist in a place that constitutes a danger to an employee, an employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing or to work in that place, but the employee may, by notice in writing given within seven days of receiving notice of the decision of a safety officer, require the safety officer to refer his decision to the Board, and thereupon the safety officer shall refer the decision to the Board."

"128. (1) Subject to this section, where an employee while at work has reasonable cause to believe that

(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or

(b) a condition exists in any place that constitutes a danger to the employee,

the employee may refuse to use or operate the machine or thing or to work in that place."

The Board heard the parties in Montréal on March 30, 1993.

## II

From the outset of the public hearing, counsel for VIA Rail Canada Inc. (VIA Rail) raised a preliminary objection concerning the time limits to be observed in referral cases. The safety officer had raised this question when he referred his decision to the Board at Mr. Lamoureux's request.

Counsel for the employer alleged that the employee's request was inadmissible because the requirements relating to the time limits set out in section 129(5) of the Code for making said request did not appear to have been met, i.e., the

request for referral was not made within seven days of the employee's receiving notice in writing of the safety officer's decision.

After hearing the nature of this objection, the Board informed the parties that it would take the objection under advisement and hear the evidence in this case. Since it was not clear when exactly Mr. Lamoureux received the safety officer's written decision, and since no official document confirming this date could be produced at the hearing, the Board can only assume that the request was made within the time limits set out in the Code.

### III

The principal facts of the present case are straightforward and uncontested.

The employee is a carman employed by VIA Rail. On November 11, 1992, Mr. Lamoureux had to inspect a consist located on track R-3 of the Montréal Maintenance Centre's marshalling yard. He refused to work when he saw that a car not coupled to the consist had been left on the same track, some 40 feet from the consist.

The employee considered it dangerous to work in the circumstances because the consist and the uncoupled car could have collided, thereby involving the employees working around the consist or crossing the track between the consist and the car in a serious accident.

The blue flags and blue lights used to indicate the presence of workmen nearby had not yet been installed because the employee had already refused to do the work. These safety devices normally must be placed on the track, in front of

the consist and behind the uncoupled car, before work begins.

Mr. Lamoureux felt that, even if the safety procedure, consisting in displaying blue flags, had been applied, there was still a danger: rolling stock could have been shunted onto track R-3 by mistake.

Mr. Ouimet, the employee's supervisor, offered to let Mr. Lamoureux position himself near the blue flag placed at the rear of the car to keep watch. However, this additional measure apparently did not satisfy the employee.

When Mr. Lamoureux continued to refuse to work, a telephone call was made around 8:10 p.m. requesting that a safety officer investigate the matter. Mr. Bastien arrived at the scene around 9:20 p.m. and conducted the investigation required by section 129 of the Code. The following day, he informed orally the parties concerned of his no-danger decision.

During his testimony, Mr. Bastien noted that this was the first time he had conducted an investigation following a refusal to work in the railway industry. He had clearly understood the nature of the work to be done by the carmen since he had received the relevant information from Mr. Lamoureux and other carmen present in the work place.

He had then conducted his investigation of Mr. Lamoureux's reason for refusing, namely, the presence of the uncoupled car near the consist on the same track. He added that, during his investigation, Mr. Lamoureux and the employer confirmed that all safety measures had been taken and that the hand brakes of the car had been applied.

The officer then contacted a Labour Canada safety officer who drew to his attention the provisions of section 26 of the Uniform Code of Operating Rules dealing with protection using blue flags. These provisions were approved by Transport Canada on January 16, 1990. He added that he took these provisions into account in reaching the decision at page 6 of his investigation report of November 19, 1992. His decision reads as follows:

**"FOLLOWING AN INVESTIGATION AND WHEREAS:**

- the consist and the waiting car on track R-3 were secured in accordance with normal work procedures;
- had it not been for the work interruption caused by the complainants' refusal, the blue signals would have been placed in accordance with the employer's normal procedure and the Transport Canada Uniform Code of Operating Rules;
- the **Transport Canada Uniform Code of Operating Rules** does not state that no uncoupled rolling stock is permitted within the safety zone provided by the blue flag procedure;
- there was no rolling stock on track R-3 that could conceal the blue flags and flashing lights placed in front of the consist and at the rear of the waiting car;
- the employees who must cross the track between the consist and the waiting car must follow the safety rules established by VIA Rail;

I decide that no danger existed.

(signed)

*André Bastien*  
Labour Affairs Officer"

(translation)

Mr. Lamoureux's representative alleged that the safety officer assigned to the case did not have sufficient knowledge of the safety rules and the procedures applicable to Carmen to conduct a valid investigation. For example, argued the representative, the officer did not take into account the provisions in Appendix I of collective agreement no. 3, entitled Regulations for the Protection of Employees

While Inspecting, Servicing, Repairing and Working in and about Cars and Locomotives.

IV

The Board's powers relating to the reference of a safety officer's decision are set out in section 130(1) of the Code:

"130. (1) Where a decision of a safety officer is referred to the Board pursuant to subsection 129(5), the Board shall, without delay and in a summary way, inquire into the circumstances of the decision and the reasons therefor and may

(a) confirm the decision; or

(b) give any direction that it considers appropriate in respect of the machine, thing or place in respect of which the decision was made that a safety officer is required or entitled to give under subsection 145(2)."

The Board examined without too much formality the facts, reasons and circumstances that led the safety officer to decide that there was no danger to the employee or that no condition in the work place constituted a danger to that employee.

The Board considered these questions in a context where the notion of danger within the meaning of Part II of the Code covers situations where the danger to the employee must be imminent or immediate. In addition, the definition does not include danger that is either inherent in the employee's work or a normal condition of employment. In David Pratt (1988), 73 di 218; and 1 CLRBR (2d) 310 (CLRB no. 686), the Board clarified the notion of "danger" within the meaning of the Code. It said the following in this regard:

"Not only must the risk of danger be immediate, it must also involve a hazard or condition that was intended to be covered by Part IV. I agree with the safety officer's view in this case that danger under Part IV regarding an employee's

right to refuse under sections 85 and 86 and also under section 102(2), which refers to the powers of safety officers to issue directions in dangerous situations, was not intended to deal with danger in the broadest sense of the word. For the purposes of these sections, which I believe are the only provisions in Part IV that refer to danger, the risk cannot be something that is inherent in an employee's work or a normal condition of employment..."

(pages 224; and 316)

The Board also examined the element of urgency added to the definition of danger in Gilles Lambert (1989), 78 di 69 (CLRB no. 748):

"1. The danger must be immediate and real: in other words, the risk to the employee or employees must be serious to the point where the machine or thing may no longer be used until the situation is corrected.

2. The danger must be one that Parliament intended to cover in Part II of the Code. This would accordingly exclude a danger arising from a situation where the risk is inherent in the employee's work or is a normal condition of work (section 128(2)(b))."

(page 79)

Consequently, the Board, relying on a narrow interpretation of the word "danger," is required to examine the safety issue that led to the refusal to work. It must also examine the nature and quality of the safety officer's investigation to ensure that he validly concluded that there was no reason to refuse to work under section 128 of the Code.

In the instant case, the Board is satisfied that the safety officer made sure during his investigation that all normal safety procedures had been followed and that the hand brakes of the uncoupled car had been applied. Moreover, the standard procedure concerning placing blue flags and lights, provided for in the Uniform Code of Operating Rules, would have been applied had it not been for the interruption caused by the refusal to work.

It was argued that the carmen could have been involved in an accident because their field of vision was limited by the presence of the stationary car some 40 feet from the consist. However, the Board is not convinced that the presence of this car caused or constituted an immediate and real danger within the meaning of the Code.

Placing blue flags and lights, which is accepted by Transport Canada, is a common safety procedure throughout the railway industry. Its purpose is to indicate the presence of employees working near rolling stock. The fact that the blue flags and lights are placed at the rear of an uncoupled car, rather than a coupled car, does not, in our opinion, increase the risk of an accident and does not constitute a danger within the meaning of the Code.

The Board, like the safety officer, is also able to conclude from reading section 26 of the Unified Code of Operating Rules that it does not prohibit the presence of uncoupled rolling stock within the safety zone provided by the blue flag procedure.

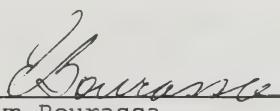
The union representative argued that Mr. Bastien lacked the necessary expertise to conduct the investigation and that he had failed to consult certain safety provisions of the collective agreement before making his determination.

On this question, we wish to explain that the safety officer's role, where a refusal to work occurs, is limited to gathering the parties' comments or arguments, investigating the reasons for the refusal and deciding whether or not a danger exists. This is what Mr. Bastien did in the instant case. The employer's failure to observe rules or procedures does not automatically presuppose the existence of a danger. If a safety officer believes that Part II of the Code is being contravened, he can, pursuant

to powers conferred on him by section 145(1) of the Code, direct the employer concerned to cease contravening the Code.

Having examined the documentary evidence and the submissions of the parties, the Board declares that the safety officer conducted a speedy and adequate investigation within the meaning of the Code and that his findings are reasonable in the circumstances of the case.

Accordingly, the Board confirms safety officer Bastien's no-danger decision of November 19, 1992.

  
\_\_\_\_\_  
Evelyn Bourassa  
Member

ISSUED at Ottawa, this 1st day of October 1993.

CCRT/CLRB - 1033



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## Summary

D.M. Hlady and J.N. Harris, complainants, International Brotherhood of Electrical Workers, Local 1541, respondent, and ITT Federal Services Corporation, employer.

Board files: 745-4429  
745-4442

Decision No.: 1034

## Résumé

D.M. Hlady et J.N. Harris, plaignants, Fraternité internationale des ouvriers en électricité, section locale 1541, intimée, et ITT Federal Services Corporation, employeur.

Dossiers du Conseil: 745-4429  
745-4442

Decision n°: 1034

This is a complaint filed by two individuals under the duty of fair representation provisions in the Canada Labour Code (Part I - Industrial Relations). The only complainant who appeared before the Board claimed that the union had not properly handled his grievance regarding seniority. He was laid off while employees who enjoyed "super-seniority" through a provision in the collective agreement remained on the job.

In particular, the complainant was of the opinion that individuals who had been appointed to executive board positions should not be protected from lay-off as they had not been elected. He argued that the term in the collective agreement "elected at large" with regards to the three executive members meant that they had to actually run in an election to enjoy super-seniority.

The business manager was of the opinion that it did not matter whether executive board members were elected or appointed, they could still hold super-seniority. However, at the complainant's request, the union's lawyers were asked to prepare a legal opinion on the matter. The opinion concurred with the point

Il s'agit ici d'une plainte déposée par deux particuliers concernant le devoir de représentation juste prévu dans le Code canadien du travail (Partie I - Relations du travail). Le seul plaignant qui s'est présenté devant le Conseil prétend que le syndicat n'a pas bien traité son grief concernant l'ancienneté. Il a été mis à pied, tandis que des employés qui jouissaient d'**«ancienneté privilégiée»** aux termes d'une disposition de la convention collective travaillaient toujours.

En particulier, le plaignant est d'avis que les personnes qui ont été nommées à des postes du conseil exécutif ne doivent pas être à l'abri de mises à pied parce qu'elles n'ont pas été élues. Il soutient que le terme **«élus»** qui figure dans la convention collective à l'égard des trois membres du conseil exécutif veut dire que, pour jouir d'ancienneté privilégiée, ceux-ci doivent s'être présentés aux élections.

Le chef de bureau est d'avis qu'il importe peu que ces membres aient été élus ou nommés pour jouir d'ancienneté privilégiée. Cependant, à la demande du plaignant, les avocats du syndicat ont préparé une opinion juridique à cet égard. Cette opinion était identique au point de vue du chef de bureau.

of view of the business manager.

The Board dismissed the complaint. It found the union did turn its mind to the grievance. It stated as it has done in the past that it will not intervene in a disagreement over a collective agreement interpretation unless there are signs the union has acted in an arbitrary or discriminatory manner or in bad faith.

The complainant was also dissatisfied because the union officers did not listen to the request of some union members not to appoint junior members to super-seniority positions. The Board stated that under section 37 of the Code, it must address only the question of whether a union has acted in a manner that is contrary to the Code with respect to the applicable rights under the collective agreement. The question of whether union officers abided by the wishes of the membership cannot be decided pursuant to section 37 of the Code. The way to remedy this situation is through the union's internal mechanisms.

Le Conseil a rejeté la plainte. Il a jugé que le syndicat avait bien traité le grief. Il a déclaré, comme il l'a fait par le passé, qu'il n'interviendrait pas dans un conflit découlant de l'interprétation d'une convention collective, à moins qu'il n'existe des indices que le syndicat a agi de façon arbitraire ou discriminatoire ou de mauvaise foi.

Le plaignant est aussi mécontent parce que les dirigeants syndicaux n'ont pas acquiescé à la demande faite par certains membres de ne pas nommer des membres ayant moins d'années de service à des postes donnant droit à l'ancienneté privilégiée. Le Conseil a affirmé que, aux termes de l'article 37 du Code, il ne doit trancher que la question de savoir si un syndicat a agi d'une façon qui va à l'encontre du Code en ce qui a trait aux droits applicables prévus par la convention collective. La question de savoir si les dirigeants ont respecté les désirs des membres ne peut être tranchée aux termes de cet article. Il faut remédier à ce genre de situations au moyen des mécanismes internes du syndicat.

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Reasons for decision

D.M. Hlady and J.N. Harris,

*complainants,*

*and*

International Brotherhood of  
Electrical Workers, Local  
1541,

*respondent,*

*and*

ITT Federal Services  
Corporation,

*employer.*

Board files: 745-4429  
745-4442

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The Board was composed of Mr. Richard I. Hornung, Vice-Chair, and Messrs. Calvin B. Davis and Patrick H. Shafer, Members.

Appearances

Mr. D.M. Hlady, on his own behalf;

Messrs. Lawrie Cherniak and David M. Shrom, for the International Brotherhood of Electrical Workers, Local 1541; and

Ms. Kristin Lercher, for ITT Federal Services Corporation.

Reasons for decision were written by Mr. Calvin B. Davis, Member.

These reasons deal with two complaints filed under the duty of fair representation provisions contained in section 37 of the Canada Labour Code (Part I - Industrial Relations). The two complainants, D.M. Hlady and J.N. Harris, were employed by ITT Federal Services Corporation on the DEW Line. After several years of employment they were laid off. Both complained that the union would not pursue their grievances when they were laid off while junior employees continued to work.

On July 8, 1993, Mr. Harris wrote a letter to the Board stating that he was unable to attend the hearings scheduled for July 29 and 30, in Winnipeg. He enclosed a summary of his position, and the claim he was making should the matter be ordered to arbitration.

At the hearing, Mr. Hlady requested that Mr. Harris' complaint be heard nonetheless. He maintained that the facts were virtually the same and that, if there was to be a finding on his complaint, it should also be the same for Mr. Harris' complaint.

The Board is of the view that Mr. Harris' complaint must be dismissed outright as the complainant never appeared at the hearing. It would be difficult for the respondent union to take issue with any of Mr. Harris' allegations without him being present. Furthermore, Mr. Harris never did file a grievance in accordance with the collective agreement. Consequently, it is difficult to determine what rights flowing from the collective agreement the union may have violated or what actions, if any, the union may have taken on his behalf.

Mr. Hlady was a long-time employee who worked on the DEW Line as a console operator for some 13 or 14 years. It had become known that the DEW Line was shutting down and layoffs were forthcoming. Therefore, Mr. Hlady as well as others became concerned about the "super-seniority" provisions in the collective agreement, which meant they might be laid off before junior employees.

At station meetings, the super-seniority provisions were discussed. Letters were sent to the union officers urging that the most senior employees fill any executive vacancies. There would then be no problem as the

employees would be laid off in accordance with the seniority principle. The union officers ignored this request and went ahead and appointed junior employees.

The employer notified Mr. Hlady he would be laid off on October 28, 1992. However, on October 26, his lay-off was postponed until November 4, 1992. On October 19, 1992, Mr. Hlady filed a grievance alleging that the employer violated Article 8 Section 4 of the collective agreement, which reads as follows:

*"As long as there is work available which he is capable of performing, the Steward shall hold seniority over all employees at his Station, in his respective occupational classification. The President, Vice-President, Treasurer, Recording Secretary, (2) Area Stewards, (1) Chief Steward of Local 1541 along with (3) Executive members elected at large shall hold seniority over all employees in their respective occupational classifications. These provisions shall apply only in the case of layoff."*

(emphasis added)

Mr. Hlady filed his grievance because he felt that individuals who had been appointed to executive board positions should not be protected from lay-off as they had not been elected. He argued that the term in the collective agreement "elected at large" with regards to the three executive members meant that they had to actually run in an election to enjoy super-seniority.

John Colley was at the time of the grievance the business manager of the local that dealt with Mr. Hlady's complaint. He explained to the Board that Article 8 Section 4 had been in the collective agreement for many years. The clause had been negotiated in the collective agreement because at times it was difficult to get members to serve on the executive. Often individuals would have to be appointed. Letters were sent to the site stewards asking them to

inform the membership that volunteers who wished to serve on the executive were being sought.

While someone may volunteer, that did not mean that the person was guaranteed an executive position as it was the president in conjunction with members of the executive board who filled existing vacancies. The union officers often appointed area stewards, even if they were juniors since, in their opinion, they have already served the union well.

The business manager was of the opinion that it did not matter whether executive board members were elected or appointed, they could still hold super-seniority. However, at Mr. Hlady's request, the union's lawyers were asked to prepare a legal opinion on the matter. The legal opinion stated the following:

*"As we understand the facts, certain persons who are now members of the Executive Board were not elected, but were rather appointed to fill vacancies on the Executive Board in accordance with Article XVII, Section 16, of the Constitution.*

*Based on the above, we interpret the phrase 'elected at large' in Article 8(4) to be descriptive of the office, rather than a condition precedent for the 'super-seniority' provided in the clause. The clause describes various members of the Executive Board, and the whole phrase 'three Executive members elected at large' describes those individuals who fill those three positions, regardless of whether they were elected, or subsequently appointed to fill the remaining term."*

After receiving the legal opinion which concurred with his own point of view, Mr. Colley withdrew the grievances as he felt the collective agreement had not been violated.

When Mr. Hlady received the union's and its legal counsel's opinion, he was still not convinced the opinion was correct or necessarily to the point. He took the legal opinion to

his own lawyer who stated that it was flawed.

When Mr. Hlady went to the union office to discuss the withdrawal of the grievance, Mr. Colley refused to discuss the issue further. Mr. Hlady's next step was to file this complaint with the Board.

Section 37 of the Code reads as follows:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

Mr. Hlady complained that the union had not properly handled his grievance regarding seniority. Seniority is one of the most valuable rights that an individual has flowing from a collective agreement. It is determinative of such things as vacation time, promotions, transfers and most importantly, such as in the case of Mr. Hlady, the timing and the order of a lay-off.

Seniority rights are subject to the collective bargaining process like any other employee rights. So even though Article 8 Section 4 of the collective agreement may be considered as unfair by some members, it was negotiated in the collective agreement. The union therefore has the right to interpret that particular clause in a manner it feels it was negotiated.

In Peter Klippenstein (1991), 86 di 33 (CLRB no. 889), the Board said the following regarding a union's decision not to proceed with a grievance:

*"It is a union's prerogative whether to file a*

grievance or not and this Board will not intervene unless such a decision is arbitrary or tainted with bad faith, gross negligence, discrimination, hostility or other such unlawful motive. Even if a union is wrong in the opinion of the Board when it decides not to proceed with a grievance, this is not sufficient grounds for the Board's intervention provided the decision was made in good faith. ...."

(page 36)

Differences of opinion over collective agreement interpretation are not, in themselves, grounds to support a finding that a bargaining agent has breached its duty of fair representation. The Board has also said that it will not intervene in this type of situation unless there are clear signs that a union has acted in an arbitrary or discriminatory manner or in bad faith. There was nothing in the evidence that showed any hostility, revenge, or bad feelings on the part of the union against Mr. Hlady.

Mr. Hlady was also dissatisfied because the union officers did not listen to the request of some union members not to appoint junior members to super-seniority positions. The Board had the following to say about a complaint of this nature in Jacques Poitras (1986), 63 di 183 (CLRB no. 546):

"Section 136.1 is limited in scope. Its purpose is not to penalize the want of generosity on the part of unions, their officers and their representatives. Nor is it its purpose, except insofar as follows, to impose penalties related to the quality of union representation as a whole. In fact, the sole aim of section 136.1 is to prevent excesses. To use a well-known analogy, Parliament did not intend the Board to become a 'Better Union Bureau' or, in French, a 'Bureau d'éthique syndicale,' responsible for monitoring all union practices according to rules comparable to consumer protection.

The Board must avoid substituting itself for the employees or their unions in the conduct of their affairs. Within the parameters of the Code, which confers on the union a wide margin of discretion, it is important to guard against a paternalistic approach which would justify intervention in matters that concern only the employees. If the union or the union representatives are not up to the task, the employees have ways to get rid of them. They

can dismiss the incompetents, both employees and elected officials, and possibly, by using the revocation mechanism, can even oust a union that is considered too soft.

It is with these rules in mind that we must dispose of this matter. We must also guard against applying section 136.1 to every type of situation, even when there is no doubt that a union has acted badly, or appeared particularly weak for a union of its size or with its resources. In the final analysis, the union can make a mistake, even a serious one. However, it must not act unfairly."

(page 190; emphasis added)

In Jacques Poitras, supra, the Board concluded:

"After due consideration and not without some hesitation, we believe that, despite its obvious weakness, the evidence did not demonstrate that the union representative had handled Mr. Poitras' case dishonestly. The union was well acquainted with the case when it made its decision. ...

...

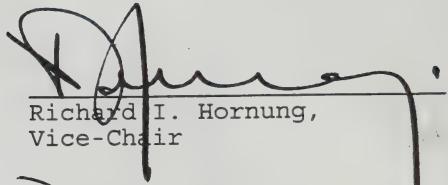
In fact, the union's decision not to proceed with the grievance was based on an inept but nonetheless not grossly incorrect reading of the collective agreement. On the other hand, it was fully acquainted with the facts that had given rise to the employer's decision.

The union made its decision in its usual manner, and it was communicated to the complainant. In short, there is no indication on file that the union's action was arbitrary, discriminatory or hostile. It was certainly a questionable and perhaps a dubious decision, but it was not wrongful."

(page 192)

Under section 37 of the Code, the Board must address only the question of whether a union has acted in a matter that is contrary to the Code with respect to the applicable rights under the collective agreement. The question of whether union officers abided by the wishes of the membership cannot be decided pursuant to section 37 of the Code. As is clear in these reasons, the way to remedy this situation is through the union's internal mechanisms.

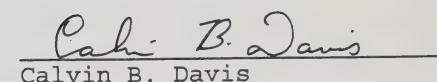
In conclusion, the complaints of Messrs. Harris and Hlady  
are dismissed.



Richard I. Hornung,  
Vice-Chair



Patrick H. Shafer  
Member



Calvin B. Davis  
Member

DATED at Ottawa this 7th day of October, 1993.

CLRB/CCRT - 1034

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## Summary

Canadian Association of Smelter and Allied Workers, Local No. 4, applicant, and Royal Oak Mines Inc. and Giant Mines Employees Association, respondents.

Board files: 530-2199; 530-2200  
X-ref: 555-3528; 555-3529  
Decision No. 1035

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## Résumé

Association canadienne des travailleurs de fonderie et ouvriers assimilés, section locale n° 4, requérante, ainsi que Royal Oak Mines Inc. et Giant Mines Employees Association, intimées.

Dossier du Conseil: 530-2199; 530-2200  
Renvoi: 555-3528; 555-3529  
Décision n° 1035

The Board in plenary session referred decision no. 1010 back to the original panel for determination of whether the Giant Mines Employees Association is employer dominated or influenced under section 25 of the Code.

The original panel re-examined the evidence before it in accordance with the appropriate test established by the plenary Board decision. It concluded that there is sufficient circumstantial evidence of a lack of arm's length relationship between the employer and the Giant Mines Employees Association before it to make a finding of employer domination pursuant to section 25(1) of the Code.

Consequently, although the application for certification in file 555-3528 was dismissed for lack of support, it is also dismissed pursuant to section 25(1).

With respect to Board file 555-3529, the Board rescinds its order of a vote and, pursuant to section 25(1), dismisses the application for certification.

Le Conseil, réuni en séance plénière, a renvoyé au banc initial la décision n° 1010 afin qu'il tranche la question de savoir si la Giant Mines Employees Association est dominée ou influencée par l'employeur en contravention à l'article 25 du Code.

Le banc initial a réexaminé la preuve à la lumière des critères établis par la décision du Conseil en séance plénière. Il a conclu que la preuve circonstancielle démontre une absence de relation d'indépendance entre l'employeur et la Giant Mines Employees Association et, par conséquent, de domination de la part de l'employeur au sens du paragraphe 25(1) du Code.

Conséquemment, la demande d'accréditation dans le dossier 555-3528 est rejetée en vertu du paragraphe 25(1) du Code, même si elle a déjà été rejetée en raison du manque d'appui majoritaire.

En ce qui concerne la demande d'accréditation dans le dossier 555-3529, le Conseil annule l'ordonnance de scrutin et rejette la demande d'accréditation fondée sur le paragraphe 25(1) du Code.

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Reasons for decision

Canadian Association of Smelter  
and Allied Workers, Local  
No. 4,

applicant,

and

Royal Oak Mines Inc. and Giant  
Mines Employees Association,  
respondents.

Board File: 530-2199; 530-2200  
X-ref: 555-3528; 555-3529

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The Board was composed of Mr. J.F.W. Weatherill,  
Chairman, and Mr. Michael Eayrs and Ms. Mary Rozenberg,  
Members.

Appearances (on record)

Mr. Leo McGrady, Ms. Gina Fiorillo and Mr. Harry Seeton,  
for the applicant;

Messrs. Michael A. Coady and Bill Heath, for Royal Oak  
Mines Inc.; and

Messrs. Israel Chafetz and Jim O'Neil, for the Giant  
Mines Employees Association.

In Royal Oak Mines Inc. (1993), as yet unreported CLRB  
decision no. 1010, issued on May 5, 1993, this panel of  
the Board dismissed the application for certification,  
and made the determination, among others, that the  
applicant (which was found to be a trade union within the  
meaning of the Canada Labour Code) had not been shown to  
be "so dominated or influenced" by the employer that its  
fitness to represent employees for the purpose of  
collective bargaining was impaired. This conclusion was  
one in respect of which the respondent trade union  
brought an application for reconsideration, and which

was referred by a reconsideration panel to the full Board for determination. It was also agreed by all parties that the full Board determination with respect to the issue of employer domination would apply to the application for certification in file 555-3529.

The full Board, in Royal Oak Mines Inc. (1993), as yet unreported CLRB decision no. 1028, issued on August 31, 1993, concluded:

*"It is not clear from the original decision whether or not the panel considered the key issue of whether employer domination or sufficient influence destroyed the arm's length relationship which must exist between Royal Oak Mines and the Giant Mines Employees Association."*

(page 13)

Section 25 of the Code reads:

*"25.(1) Notwithstanding anything in this Part, where the Board is satisfied that a trade union is so dominated or influenced by an employer that the fitness of the trade union to represent employees of the employer for the purpose of collective bargaining is impaired, the Board shall not certify the trade union as the bargaining agent for any unit comprised of employees of the employer and any collective agreement between the trade union and the employer that applies to any such employees shall be deemed not to be a collective agreement for the purposes of this Part."*

The full Board was of the view that the questions of domination and influence in section 25 are distinct; it concluded that the original panel did not apply the appropriate test, and the question was referred back to us for determination.

The full Board determined, contrary to the conclusion of the original panel, that there is no distinction in the intent of the test implicit in section 25 of the Code between the Canada Labour Code and the applicable law in other jurisdictions. It said:

*"The threshold test to be applied in this jurisdiction, much like in all provincial jurisdictions, in order to determine if a trade union is dominated or unduly influenced by the employer, is whether there exists a proper arm's length relationship between the trade union and the employer."*

(page 7; emphasis added)

The full Board went on to say:

*"... any degree of domination suffices to trigger section 25, since it impairs a union's fitness to represent employees. Domination implies the lack of an arm's length relationship. ..."*

(page 10; emphasis added)

With respect to the existence of an arm's length relationship the full Board further said:

*"... it is also imperative that employees perceive that a trade union seeking their support is an institution totally independent of management, capable of asserting their claims and enforcing their interests. ..."*

(page 9)

It is against this background that we have revisited the evidence originally before us.

As is most often the case in matters involving allegations of employer domination or influence, much of the evidence is circumstantial in nature. Nevertheless such evidence may properly be relied on in determining

matters of this sort. Some of the more salient evidentiary points may be summarized as follows.

Almost immediately following the commencement of the strike/lockout between the incumbent union (Canadian Association of Smelter and Allied Workers or CASAW) and Royal Oak Mines Inc. (the employer), Jim O'Neil who was then still a member of CASAW and on strike contacted senior officials of the employer to discuss alternate bargaining proposals. He did so without authorization from CASAW. The employer discussed alternate proposals with O'Neil who attempted, without success, to gain support for them from CASAW officials. Shortly thereafter, O'Neil contacted Terry Byberg, the employer's mine superintendent (with whom he had attempted to bargain), asked for and was supplied with the names of "good labour lawyers." O'Neil was later to utilize one of the lawyers whose name Byberg provided as counsel in his subsequent attempts to form and have certified the Giant Mines Employees Association (the Employees Association).

In August 1992, after contacting Byberg, O'Neil crossed the picket line and returned to work and in November 1992 was unilaterally appointed by Byberg as the employee co-chairman of the Joint Occupational Health and Safety Committee (a committee to which CASAW had previously appointed employee representatives).

In mid-November, just prior to a mailing in connection with organizing the Employees Association, O'Neil found on company premises an almost complete typed mailing list of names and addresses of employees and, during the active period of organizing the Employees Association, he

was granted periods of time off work. O'Neil, as Chairman of the applicant Employees Association, was also granted time off to attend some proceedings of the Industrial Inquiry Commission. The contact between O'Neil and senior officials of the employer (primarily Byberg) was consistent from the commencement of the strike/lockout, through the organizing period and up to the application for certification filed by the Employees Association.

These and other items of circumstantial evidence are such that, given the full Board's enunciation of the appropriate tests to be applied, we now conclude that there is, on the balance of probabilities, sufficient evidence of a lack of arm's length relationship between the Employees Association and the respondent employer to make a finding of employer domination pursuant to section 25(1) of the Code.

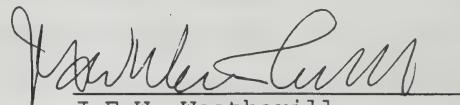
At page 13 and 14 of CLRB decision no. 1028, supra, the full Board directed the original panel to review the evidence in both files 555-3528 and 555-3529 and make a determination with respect to the matter of employer domination.

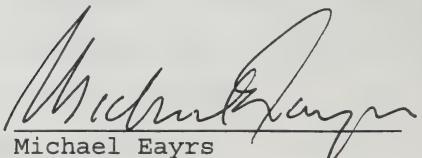
Accordingly, although the application for certification in file 555-3528 was dismissed for lack of employee support, it is also dismissed pursuant to section 25(1).

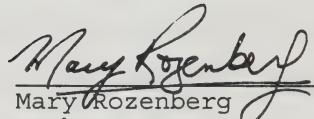
With respect to file 555-3529, the Board had previously by letter dated May 6, 1993 ordered a vote (subsequently held in abeyance by the Board's letter dated June 16, 1993). Accordingly, the Board rescinds its order of a

vote in that file and, pursuant to section 25(1) of the Code, dismisses the application for certification in file 555-3529.

This is a unanimous decision of the Board.

  
\_\_\_\_\_  
J.F.W. Weatherill  
Chairman

  
\_\_\_\_\_  
Michael Eayrs  
Member

  
\_\_\_\_\_  
Mary Rozenberg  
Member

ISSUED at Ottawa, this 26th day of October 1993.

CLRB / CCRT - 1035

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## SUMMARY

Gérald Godin, applicant, and Loomis Armored Car Service Ltd., employer.

Board Files: 530-2193  
950-253

Decision no. 1036

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## RÉSUMÉ

Gérald Godin, requérant, et Les Blindés Loomis Ltée, employeur.

Dossiers du Conseil: 530-2193  
950-253

Décision n° 1036

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The employer seeks reconsideration of the Board's decision in Gérald Godin (1993), as yet unreported CLRB decision no. 1001, where the Board found that, in the particular circumstances and location of the delivery described therein, a dangerous condition existed in respect of the messenger working alone. The reconsideration panel remitted the matter to the original panel so it could issue any directions it considered appropriate, pursuant to section 130(1)(b) of the Canada Labour Code, Part II.

The original panel confirms its decision that danger existed; however, under the circumstances, it does not consider that any particular direction should be issued pursuant to section 130(1)(b).

L'employeur veut faire réexaminer la décision rendue par le Conseil dans Gérald Godin (1993), décision du CCRT n° 1001, non encore rapportée, où celui-ci a jugé que, dans les circonstances et à l'endroit de livraison qui y sont décrits, il y avait danger lorsqu'un messager travaillait seul. Le banc de révision a renvoyé l'affaire au banc initial pour permettre à celui-ci de donner les instructions qu'il juge indiquées, aux termes de l'alinéa 130(1)b) de la Partie II du Code canadien du travail.

Le banc initial a confirmé sa décision selon laquelle il y avait danger; cependant, dans les circonstances, il ne croit pas qu'il y ait lieu de donner des instructions en conformité avec l'alinéa 130(1)b).



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Reasons for decision

Gérald Godin,

applicant,

and

Loomis Armored Car  
Service Ltd.,

employer.

Board files: 530-2193  
950-253

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The Board consisted of Mr. J.F.W. Weatherill, Chairman, sitting as a single member pursuant to section 156 of the Canada Labour Code (Part II - Occupational Safety and Health).

Appearances (on record)

Mr. A.D. Smith, for the applicant; and

Mr. G.P. Archambault, for the employer.

In Gérald Godin (1993), as yet unreported CLRB decision no. 1001, issued on March 25, 1993, it was determined, on a reference by the applicant of a safety officer's finding that there was no danger in the circumstances set out, "that a condition existed at the place in which the investigation was made that constituted a danger to the employee" (page 4).

The circumstances involved were those of delivery of valuables in a particular location. The employer operates an armored car delivery service, and on the occasion in question sought to deliver valuables using a two-man crew, consisting of a driver and a messenger. It was considered that in the particular circumstances and location of the delivery described in that decision, a dangerous condition existed in respect of the messenger working alone.

After describing the circumstances, the Board in Godin, supra, stated the following:

"In the Board's view, these circumstances were not safe ones for the performance of the work in question, and a dangerous condition did exist. This is not to say that the condition could only be relieved by the provision of a three-man crew. Different or enhanced security arrangements in respect of the particular location might well create conditions in which no danger would be found to exist. ...."

(page 4)

The employer brought an application for reconsideration of that decision, requesting "that the above decision be reviewed 'in light' of the inherent dangers of our industry as well as with a review of similar cases across the country." In his reply to the application for reconsideration, the applicant's representative advanced, inter alia, the view that "mandatory three-man crews throughout the industry is essential to safety." Neither party requested that any direction be given which would be specific to the circumstances dealt with in Godin, supra, nor had any such direction been requested in the earlier proceedings.

The application for reconsideration was dealt with in accordance with the Board's usual procedure, and in a letter decision dated September 16, 1993, the Board wrote that while the application did not raise issues warranting a referral to a plenary session of the Board, since a finding had been made that danger existed, the matter was referred back to the original panel "so that it may, pursuant to section 130(1)(b) of the Canada Labour Code (Part II - Occupational Safety and Health), 'give any direction that it considers appropriate in respect of the machine, thing or place in respect of

which the decision was made that a safety officer is required or entitled to give under section 145(2).'"

Section 130(1) of the Code provides as follows:

"130.(1) Where a decision of a safety officer is referred to the Board pursuant to subsection 129(5), the Board shall, without delay and in a summary way, inquire into the circumstances of the decision and the reasons therefor and may

(a) confirm the decision; or

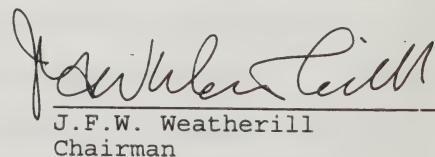
(b) give any direction that it considers appropriate in respect of the machine, thing or place in respect of which the decision was made that a safety officer is required or entitled to give under subsection 145(2)."

In Godin, supra, the safety officer's decision was not confirmed. The Board did not, however, issue any specific direction in respect of "the machine, thing or place in respect of which the decision was made," no such direction being appropriate or requested in the circumstances. The Board has a discretion in this regard under section 130(1). In their submissions to the Board on the reconsideration application, and again in their responses to the Board's invitation, in light of the reconsideration panel's decision, "to file any representations they wish to make with respect to what direction, if any, should be issued," the parties would appear to have sought to expand the scope of the Board's inquiry, even to the point of proposing amendments to the Code. The Board's jurisdiction under Part II of the Code, however, is a limited one, and arises only with respect to the particular circumstances of individual cases.

With respect to the circumstances involved in Godin, supra, the Board concluded that there was a danger in

making the deliveries in question, in the place in question, with a two-man crew. It followed from that that the usual three-man crew would be necessary to make such deliveries in that particular location. It was noted that "[d]ifferent or enhanced security arrangements in respect of the particular location might well create conditions in which no danger would be found to exist" (page 4), but it would have been quite inappropriate for the Board to give a specific direction, in the absence of any representations from the parties or any evidence as to what such different or enhanced security arrangements might be.

The matter has been returned to the original panel for the purpose of exercising its discretion under section 130(1). Again, however, there are no representations and no evidence in respect of any particular direction that might be given with respect to this particular location, nor is it to be expected there would be in the circumstances. The conclusion that there was danger in the particular circumstances of this case remains, but the Board does not consider that any particular direction with respect to the "machine, thing or place in respect of which the decision was made" should be issued.



J.F.W. Weatherill  
Chairman

ISSUED at Ottawa, this 2<sup>nd</sup> day of November 1993.

CLRB/CCRT - 1036

# information

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## Summary

Canadian Association of Smelter and Allied Workers, Local No. 4, Complainant, and Royal Oak Mines Inc., Respondent.

Board File: 745-4513

Decision No. 1037

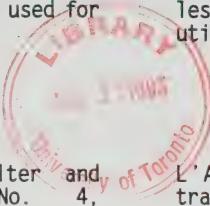
Complaint of unfair labour practice pursuant to section 97(1) of the Canada Labour Code (Part I - Industrial Relations), alleging failure to bargain in good faith by Royal Oak Mines Inc., contrary to s. 50(a) of the Code.

The context of the complaint was a protracted and bitter collective bargaining dispute which was characterized by intransigence and violence, the involvement of Special Mediators and the appointment of an industrial inquiry commission by the Minister of Labour pursuant to s. 108 of the Code.

Upon consideration of all the evidence and argument presented during 8 days of public hearings, the Board determined that the respondent had not bargained in good faith and had not made every reasonable effort to enter into a collective agreement, as required by s. 50(a) of the Code.

The Board found, *inter alia*, that the employer had required, as a precondition of bargaining, that there be no independent process for the adjudication of cases of employees discharged for picket line and related activity. The Board found that, in the circumstances, this was an improper condition, that amounted to a failure to bargain in good faith. The Board ordered the employer to submit to the union, as an offer, a proposal or a collective agreement, and ordered a back-to-work protocol and a procedure for determining the question of just cause with respect to the dismissed employees. The Board was highly critical of the bargaining postures of both parties.

The Board issued a formal order and, at the request of the union, directed that it be filed in the Federal Court of Canada.



## Résumé

L'Association canadienne des travailleurs de fonderie et ouvriers assimilés, section locale n° 4, requérante et Royal Oak Mines Inc., intimée.

Dossier du Conseil: 745-4513

Décision n° 1037

Plainte de pratique déloyale en vertu du paragraphe 97(1) du Code canadien du travail (Partie I - Relations du travail) - concernant une plainte de négociation de mauvaise foi contre Royal Oak Mines Inc., en violation de l'alinéa 50a) du Code.

La plainte a été déposée dans le cadre d'un conflit long et amer, marqué par des actes de violence et l'intransigeance des parties, la désignation de médiateurs spéciaux et la nomination, par le ministre du Travail, d'une commission d'enquête tel qu'il est prévu à l'article 108 du Code.

Après avoir entendu la preuve et les arguments des parties, au cours de huit jours d'audience, le Conseil a conclu que l'employeur n'a pas négocié de bonne foi et qu'il n'a pas fait tout effort raisonnable pour conclure une convention collective, comme l'exige l'alinéa 50a) du Code.

Le Conseil estime, notamment, que l'employeur a exigé, comme condition préalable à la négociation, qu'aucun processus indépendant ne soit mis en place pour trancher la question du congédiement d'employés en raison de leurs activités sur les lignes de piquetage ou d'activités connexes. Dans les circonstances, le Conseil juge que cette condition a été imposée à tort et qu'elle se traduit par une violation du devoir de négocier de bonne foi. Le Conseil ordonne à l'employeur de présenter au syndicat, à titre d'offre, une proposition ou une convention collective. Il a également ordonné un protocole de retour au travail, et une procédure qui permettrait de déterminer si les congédiements sont fondés sur des motifs valables. Le Conseil a fortement dénoncé les positions adoptées par les deux parties dans cette affaire.

Une ordonnance officielle a été rendue, et à la demande du syndicat, elle sera déposée à la Cour fédérale.

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Reasons for Decision

Canadian Association of Smelter  
and Allied Workers (CASAW),  
Local No.4,

*complainant,*

*and*

Royal Oak Mines Inc.,

*respondent.*

Board File: 745-4513

The Board was composed of Mr. J.F.W. Weatherill,  
Chairman, and Mr. Michael Eayrs and Ms. Mary Rozenberg,  
Members.

A hearing in this matter was held in Yellowknife,  
Northwest Territories, from November 3 to 10, 1993,  
inclusive.

Appearances

Mr. Leo McGrady, Ms. Gina Fiorillo and Mr. Harry Seeton,  
for the applicant; and

Mr. Michael Coady and Mr. Bill Heath, for the respondent.

The application before the Board, dated May 25, 1993, is  
a complaint pursuant to section 50(a) of the Canada  
Labour Code. The complaint, to which ministerial consent  
was given on May 14, 1993, alleges failure to comply with  
section 50(a) of the Code in that, after notice to  
bargain collectively was given, the respondent failed to  
bargain collectively in good faith and make every  
reasonable effort to enter into a collective agreement.

The material provisions of section 50(a) of the Code are  
as follows:

"50. Where notice to bargain collectively has been given under this Part,

(a) the bargaining agent and the employer, without delay, but in any case within twenty days after the notice was given unless the parties otherwise agree, shall

(i) meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith, and

(ii) make every reasonable effort to enter into a collective agreement; ..."

In the instant case, notice to bargain would appear to have been given appropriately and negotiations took place between the parties with a view to the renewal of a collective agreement which had been in effect between them and which expired on March 31, 1992. The present employer is the successor to the employer with whom that collective agreement was made in 1989. The mining operation with respect to which the collective agreement applies is a long established one, the Giant Mine, in Yellowknife, Northwest Territories. A collective bargaining relationship has existed for many years between the bargaining agent or its predecessors representing employees at the mine, and the employer or its predecessors. The evidence is that for many years at least - and this situation long preceded the arrival of the present employer - the relationship has not been a good one.

The evidence is also clear, and is uncontradicted, that the present employer undertook a significant risk, and took on a considerable entrepreneurial challenge, in acquiring the Giant Mine, given its age and nature, the grades of ore presently being mined and no doubt (although there is no evidence as to this), the price of gold. The evidence also shows that the present employer consciously took on a difficult labour relations

challenge, given the history and nature of the labour-management relations on the property.

Bargaining with a view to renewing the collective agreement did take place, and there is nothing in the evidence to suggest that bargaining was not carried out in good faith by both parties. Indeed, the union's negotiating committee and the management's negotiators, with the aid of a federal conciliator, succeeded in reaching a tentative collective agreement. This agreement, which would appear to have involved little if any change in wages, did involve a number of concessions whose effect would be to make the new collective agreement somewhat less generous than its predecessor, from the employees' point of view, or more particularly perhaps from that of the union. The evidence is uncontradicted that such concessions were necessary if any realistic hope of continuing the mine's operations were to be maintained. The mine operations have been losing substantial amounts of money in recent years, although the efforts of the present management have reduced, but certainly not yet eliminated, such losses.

The tentative agreement, although recommended by the union bargaining committee, was overwhelmingly rejected by the membership of the union. The evidence suggests this was particularly due to the efforts of two persons, not members of the bargaining committee, but however this may be, the fact is that the members, as they were entitled to do, rejected the agreement. This would appear to have shocked and outraged the company whose management, although experienced - and achieving very good results - in mining operations, were not experienced in collective bargaining. While the company sought to avoid a strike, and indicated that it would consider

changes to the wording of the tentative agreement, it would not agree to anything that would, overall, result in a higher cost than the agreement which it had been willing to accept. The changes on which the union was insisting would result in a considerably higher cost than the tentative agreement. It appears from the evidence that the union simply did not accept the economics of the situation, although the company's accounts were shown to the union's accountants.

No significant bargaining took place after the rejection of the tentative agreement, and a total impasse was reached. The employees voted to strike, and when it became clear that a strike was imminent, employees were locked out. The lockout and strike, which began on May 22 and May 23, 1992, have continued to this day. They have been marked by a great deal of violence, vituperation and hatred, and among the horrible events associated with them has been the mine explosion of September 18, 1992, in which nine persons working in the mine died. A striking member of the bargaining unit has been charged in respect of the explosion and deaths.

The employees, as we have said, were entitled to reject the tentative agreement, and of course they were entitled to go on strike. The employer, too, was entitled to attempt to carry on its operations and to weather the strike if it could. Its decision to carry on operations using replacement workers, while bound to worsen the collective bargaining situation, was based primarily on economic considerations: the evidence is that had the mine been closed by the strike, the probability is high that it would never have reopened. The cost of maintaining the mine on a "care and maintenance" basis was prohibitive. The mine has continued to operate, and

has returned to, and would appear at times to have surpassed, previous levels of productivity and production. If the union or the employees considered that in the circumstances that prevailed at Giant Mine in the spring and summer of 1992 they could successfully strike the company, events would appear to have proved them wrong.

Whether there is a strike or lockout in effect or not, and whether a strike has been lost or not, the obligation to bargain in good faith continues. Both the Canada Labour Code and this Board's jurisprudence are clear on this point. In the instant case, the applicant Canadian Association of Smelter and Allied Workers, Local 4 (CASAW or the union), alleges that the respondent Royal Oak Mines Inc. (Royal Oak), has failed on a number of occasions and in a number of respects to bargain in good faith.

We do not find it necessary to deal with all of the union's allegations. There are a number of crucial points with respect to which the company has taken the position either that bargaining must be delayed or that union agreement is a condition of further discussion. While the company has argued that these points must be considered as part of a package, and while in a literal sense this is obviously true, it is clear to us, on all the evidence, that on at least one of these points the company was, in effect if not in words, placing an improper precondition on the resumption of bargaining.

One of these points was the status of the bargaining agent. In January of this year, the Giant Mines Employees Association applied for certification. That application was dismissed, but it involved a question of

the definition of the voting constituency of employees who would be comprised in any bargaining unit and entitled to decide on the bargaining agent which would represent them. That issue was not finally resolved until August of this year, in a decision (Royal Oak Mines Inc. (1993), 93 CLLC 16,063 (CLRB no. 1028)) of this Board sitting in plenary session. While it may be said that there was, in one form or another, a cloud over the incumbent union's right to represent the employees in the union, the juridical fact is that the incumbent, CASAW, was at all material times the certified bargaining agent, and that it is such today. An employer cannot refuse to negotiate with the certified bargaining agent pending the results of a revocation application: see J. Phillips et al. (1978), 34 di 603; and [1979] 1 Can LRBR 180 (CLRB no. 168), referred to in Graham J. Clarke, Canada Labour Relations Board: An Annotated Guide (Aurora, Ont.: Canada Law Book Inc., 1993). The same is true of a raid application, as the decision in Maritime Employers' Association (1986), 68 di 48 (CLRB no. 602), makes clear and it is true of an application for judicial review: see Clarke, supra, and cases cited.

Understandable as the company's hesitation on this point may have been, failure to bargain on this ground constituted a failure to bargain in good faith, although standing alone, this aspect of the case might not lead the Board to intervene.

In its ultimate decision with respect to the applications for certification filed by the Giant Mines Employees Association, this panel of the Board, applying the principles enunciated by the full Board in decision no. 1028, concluded that the Association was "dominated" by the employer. This conclusion is to be understood in

light of the strict criteria set forth in decision no. 1028. It cannot be stretched into a conclusion that the employer itself "created" the Employee Association, as counsel for the union has argued. This aspect of the union's case does not succeed.

A more serious matter - the most serious, perhaps, of all those raised in this case - is that of the company's position with respect to the cases of some 45 employees, strikers, who were discharged by the company for their activities on the picket line. There is no doubt that there was considerable violence on the picket line, and that on one occasion, this developed into a full riot. After studying reports and videos of those events, the company decided to terminate the employment of those of its striking employees whom it considered to have misconducted themselves in a serious way. Employees on strike remain employees, and where they damage company property or injure other employees, they may be subject to disciplinary measures, including the termination of their employment. Where such action is taken, employees would generally have no recourse to a grievance procedure, because a collective agreement providing for such procedure is not in force. It is usual, however, where a strike is settled and a new collective agreement made, to provide, explicitly or implicitly, a procedure for determining claims that the exercise of such disciplinary powers during the strike was not for just cause. In the instant case, the company has taken the position that it will not agree to any provision for the arbitration or other independent determination of questions arising from its discharge of the 45 employees, and that it will not permit them to return to work under any circumstances. The company has indicated that there may be other employees with respect to which it would

take a similar position, and what we say in these reasons would apply equally to such cases. We find that, in effect, the company has made this refusal a precondition of bargaining, and in our view, this constitutes a failure to bargain in good faith.

The contrary situation, where a union refused to bargain until the employer took back certain employees convicted of vandalism and of assault against members of management during a lockout, was determined to be an instance of failure to bargain in good faith in the case of Les Élévateurs de Sorel Limitée (1985), 61 di 18; and 85 CLLC 16,032 (CLRB no. 512), referred to in Clarke, supra. In the instant case, the union had at one point put it forward as a condition of negotiations that there be a general amnesty for all the discharged employees. That was a demand, if an unrealistic one, which it was open to the union to put forward, but not one on which it would be permitted to insist to the point of impasse. The union quite properly withdrew this request.

This aspect of the matter calls for some elaboration, since we consider that the company's position is sincerely and deeply held, and since we consider as well that it is a position for which serious - but not persuasive - arguments can be made. If indeed the discharged employees have committed the acts of vandalism or assault which the company believes they have committed, if these were serious offenses and perhaps if the employees had previous disciplinary records, then there would of course be just cause for the termination of their employment. The company has said it will not permit their return to work because of the danger created by having such persons working together with other workers who did not share their views on the strike, and

that this is particularly important where work is to be performed in a mine, where opportunities for undetectable assaults or worse are innumerable, and where confidence in one's fellow workers is essential. This is a serious argument. The fallacy in this argument, in the present context, is that it assumes the guilt of the persons concerned or, perhaps more precisely, it asserts the jurisdiction of the company to be both accuser and judge. An employer may indeed have that jurisdiction in a non-collective bargaining situation, but this is not such a situation. Questions of identification and of course of evaluation of acts committed and the circumstances in which they were committed are best determined by an objective third party, and this is particularly so the more emotional the circumstances.

It may be true, although we express no opinion on the matter, that the employer could find itself subject to civil or even criminal liability in respect of accidents or worse attributable to the actions of employees who have returned to the workplace as the result of the decision of an arbitrator. This is not a new problem: if a collective agreement were in place, an arbitration clause would subject the employer to precisely the same risk. That risk - essentially, it is a risk of bad decisions - exists wherever there is a collective agreement. Indeed, it is inherent in every system of law. But the existence of that risk is not a valid argument against there being a system of law. There are collective agreements in the mining industry throughout this country; arbitrators have determined innumerable cases at least roughly comparable to the cases involved here, and yet nothing has been put before us to suggest that disastrous consequences have occurred. More importantly, nothing that has been said in this case

persuades us that the risk of potential liability to the company outweighs the very real risk of injustice to individuals which is implicit in the company's position.

In this respect too, then, it must be said that the company has failed to bargain in good faith. The position it has taken in this regard has blocked bargaining completely, and this is a matter in respect of which the Board must intervene. There are other company positions which we consider to be in violation of section 50(a) of the Code as well. These include the differentiation between those who have been at work during the strike and the returning strikers in respect of the proposed probation clause: such a differentiation is improper, as the Board held in Iberia Airlines of Spain (1990), 80 di 165; and 13 CLRBR (2d) 224 (CLRB no. 796). It would appear that the company has withdrawn from this position. The probation clause itself, however, is, in our view, contrary to public policy as expressed in section 57 of the Code. As well, it was a proposal which the company must have known the union - any union - could not accept, and it thus ran foul of the principle expressed by the Board in Brewster Transport Company Limited (1986), 66 di 1; 13 CLRBR (NS) 339; and 86 CLLC 16,040 (CLRB no. 574), and with which we agree.

Before we turn to the matter of remedy, we must note that the union, too, has on a number of occasions failed to bargain in good faith, although it would appear by now to have retreated from what can only be called the irrationally optimistic - and obviously unacceptable - positions it put forward from time to time. An instance of this occurred in May 1993, when the union put forward the quite unrealistic demand that the parties return to the previous collective agreement, thus seeking even more

than they had sought in January of the same year. This proposal was obviously one which had no chance of acceptance, and would tend only to reinforce the company's view that the union was not bargaining seriously.

In a matter of this sort, the Board's remedial powers are very broad. Section 99(2) of the Code provides that for the purposes of ensuring the fulfilment of the objectives of Part I of the Code - objectives set out in the preamble to Part I - the Board may, in respect of any contravention of or failure to comply with any provision to which subsection (1) applies - and that includes a contravention of or failure to comply with section 50 - "require an employer or a trade union to do or refrain from doing any thing that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of those objectives." One of the consequences of the parties' failures to comply with section 50 is that no collective agreement has been reached, where one could have been reached, and in our view would have been reached were it not for those failures, and that consequence is, in the instant case, one that is adverse to the fulfilment of the objectives of the Code.

In most cases where there has been a finding of failure to bargain, the Board has been careful to limit its intervention, and we agree that that should be the Board's usual stance. In the instant case, however, to issue a cease and desist order, or to direct the parties to bargain would, we consider, be unrealistic and even a cruel waste of time. These parties, both of them, have

repeatedly demonstrated the degree of obtuse intransigence which led the very experienced special mediators (Messrs. Ready and Munroe) to state that this has been the most difficult labour dispute either of them had witnessed. The pathetic history of the parties' negotiations, and the tragic events which have attended the failure of those negotiations lead us to share the pessimism which the mediators and others have expressed. We note, however, with a degree of hope, that since the strike and lockout began, each party has managed to provide itself with experienced and practical advisors in the persons of Mr. Mitic and Mr. Heath. The Industrial Inquiry Commissioners (who had been the special mediators) considered that those gentlemen should play a special role in the process which they recommended, and which the union accepted. The company refused that process, principally because of its provision for arbitration of the cases of the dismissed employees. We have concluded that that ground of refusal constituted a failure to bargain in good faith.

In the normal course, the Board would order that the company present to the union, for ratification, an offer similar to its "last offer", from which any improper or illegal demands were removed. In the instant case, the course of negotiations does not permit the reliable identification of any complete last offer, but it is clear to us that the recommendations of the Industrial Inquiry Commissioners would satisfy, in most respects at least, the reasonable demands of either party. It leaves it open to the parties to negotiate the few unresolved issues (other than the improper ones, most notably the issue relating to the dismissed employees), which remain. In the event the parties are unable to resolve such issues, a procedure is provided by which Messrs. Munroe

and Ready (or such other mediators/arbitrators as the Board may appoint) will either mediate or, if necessary, decide them. It is, in essence, the agreement which the company had been willing to accept, which the union rejected in May of 1992 but which it has since, in substance, accepted. Given that these parties have exhausted all possible sources of assistance - conciliation, mediation, ministerial intervention and an industrial inquiry commission, and given the damage to the community which their intransigence has caused, we consider that it would be wrong to prolong this agony further.

The Board has carefully studied and entirely agrees with the final report and recommendations of the Industrial Inquiry Commission composed of Donald R. Munroe, Q.C., and Vincent L. Ready. We acknowledge their persistent and unrelenting efforts to bring about a reasonable resolution of this dispute and their intimate knowledge of the issues, the positions of the parties and the relevant events. With this in mind, we have fashioned a remedy which, with minor necessary adjustments, incorporates the recommendations set out in their final report to the Minister of Human Resources and Labour dated September 13, 1993.

The Board appoints Messrs. Munroe and Ready to act as mediators/arbitrators (to the extent their schedules permit) to assist the parties in finally resolving all issues in dispute and arriving at a collective agreement. In the event that Messrs. Munroe and Ready or either of them may be unable or unwilling to carry out these functions, the Board retains jurisdiction to appoint such other mediators/arbitrators as it deems fit.

As well, the Board appoints Philip Kirkland, Regional Director and Registrar for the Western Region of the Board, to provide such further assistance to the parties as may be required to give effect to the Board's order.

**ORDER**

1. Royal Oak Mines Inc. (the employer) shall forthwith on receipt of this order table as its formal offer of a collective agreement with the Canadian Association of Smelter and Allied Workers, Local 4 (CASAW or the union), the tentative agreement dated April 18, 1992, save and except as it may be amended hereunder.

1.1 Issues arising under article 17 - Transportation.

1.2 Issues arising under article 8 - Statutory Holidays.

1.3 Issues arising under article 14 - Wages. This will include the issue of "Gold Scale Adjustment".

1.4 Issues arising under article 7.02(i) - Safety Inspections.

1.5 Term of Agreement.

Items 1.1 through 1.4 are referred to the parties for further negotiations, with or without the assistance of the mediators/arbitrators appointed by the Board, for a period of 30 calendar days from receipt of this Order. In the event any of the above matters remain unresolved after the passage of the 30 days, they shall be referred to the mediators/arbitrators for a process of mediation to finality to be concluded within a further 20 calendar days, subject to extension at the discretion of the

mediators/arbitrators.

With respect to item 1.5, Term of Agreement, it shall be as follows:

The term of the collective agreement shall be for a period of three years from the date of ratification. Prior to the conclusion of the third year, either party may serve the other with the usual notice to bargain. After not less than 30 calendar days' collective bargaining, as an alternative to a strike or lockout, either party may refer all outstanding issues to the mediators/arbitrators jointly for resolution to finality.

2. The back-to-work protocol, including the resolution of grievances filed during the life of the expired collective agreement shall be as follows:

2.1 The voting constituency for ratification purposes shall consist of employees in the bargaining unit as defined in Board decision no. 1028, dated August 31, 1993.

2.2 Any employee not recalled to work by the employer, whether formally dismissed by the employer or not, and if dismissed whether the dismissal was before or after the expiry of the former collective agreement, shall have the right to place his or her case before the mediators/arbitrators for review and binding determination.

2.3 Prior to the striking employees being recalled to work, there shall be a safety inspection of the mine by a joint mine occupational health and safety committee. The inspection shall be in the presence of the

mediators/arbitrators or their delegate.

2.4 Immediately following the staged recall to work outlined in paragraph 2.6 below, the employer's proposal noted at paragraph numbered 2 at page 28 of the Industrial Inquiry Commission report and recommendations dated September 13, 1993 shall be referred to a joint mine occupational health and safety committee for discussion and recommendation to the employer and the union. Either party may request the mediators/arbitrators' assistance in the preparation of a recommendation to the employer and the union.

2.5 Immediately following ratification of the new collective agreement, both parties shall take all steps available to them to withdraw and conclude any proceedings brought by one against the other in any civil court or administrative tribunal arising out of the labour dispute and related matters or conduct.

2.6 Within 15 calendar days of ratification of the new collective agreement, all surface employees shall be recalled to work; and within a further 20 calendar days all underground employees shall be recalled to work.

2.7 The replacement workers shall be end-tailed on the bargaining unit's seniority list, in order of date of hire.

2.8 It must be understood that given the tensions and animosities experienced by these parties, the return to work and the intermingling of employees must be undertaken with the utmost good faith. Accordingly, all employees at the mine (whether returning workers or ones who may have worked during the labour dispute, and

whether included in or excluded from the bargaining unit) shall be expected and required to behave appropriately and in a manner most likely to avoid confrontation. Any person acting contrary to the spirit and intent of this paragraph shall be liable to severe discipline, including dismissal. The mediators/arbitrators shall remain seized of this paragraph to ensure its proper interpretation and application.

2.9 Any grievances arising under the expired collective agreement and not falling within paragraph 2.2 above shall be referred to a joint committee comprised of Messrs. Bill Heath and Hemi Mitic. The mandate of the committee shall be to settle all such grievances within 60 calendar days of the ratification of the new collective agreement. Failing settlement, the grievances may be referred to the mediators/arbitrators to be resolved by a process of expedited arbitration.

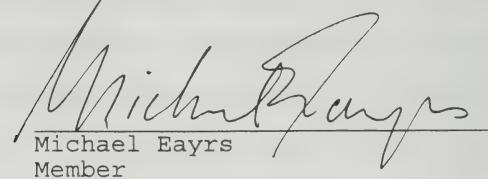
3. This Order is to be applied and interpreted having regard to the Report of the Industrial Inquiry Commission dated September 13, 1993.

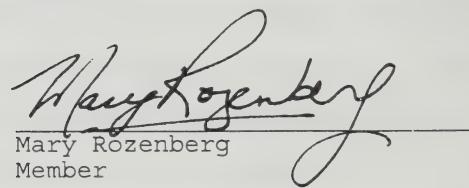
4. Any fees or expenses relating to the work of the mediators/arbitrators shall be borne jointly by the parties.

5. In the event the union does not accept and ratify the offer described above in its entirety by midnight, November 16, 1993, the parties are directed to meet and bargain in good faith and make every reasonable effort to enter into a collective agreement.

DATED AT YELLOWKNIFE, this 11th day of November 1993.

  
U.F.W. Weatherill  
Chairman

  
Michael Eayrs  
Member

  
Mary Rozenberg  
Member

CLRB/CCRT - 1037

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## Résumé

Syndicat des Employé-e-s des Aéroports de Montréal (CSD), requérant, Aéroports de Montréal, employeur, et Alliance de la Fonction publique du Canada, agent négociateur accrédité.

Dossier du Conseil: 555-3591  
Décision n° 1038

Le 12 mai 1993, le Conseil a reçu du Syndicat des Employé-e-s des Aéroports de Montréal (CSD) (le Syndicat) une demande d'accréditation pour représenter les employés techniques et de l'exploitation qui travaillent pour les Aéroports de Montréal. Cet employeur gère, depuis le 2 août 1992, les aéroports de Dorval et de Mirabel à la suite de leur cession, en application de la Loi relative aux cessions d'aéroports, sanctionnée le 19 mars 1992.

L'Alliance de la Fonction publique du Canada (l'Alliance) est accréditée depuis le 16 mars 1993 pour représenter ce groupe d'employés. L'accréditation a été accordée à l'Alliance à la suite d'une demande qu'elle a faite en vertu de l'article 47 du Code, qui permet à un syndicat ou à un employeur de demander au Conseil de revoir la structure de négociation lorsqu'un secteur de l'administration publique fédérale devient régi par la Partie I du Code.

L'Alliance s'est opposée à la recevabilité de la demande d'accréditation au motif que celle-ci ne respectait pas le délai de l'alinéa 24(2)b) du Code puisque, selon l'Alliance, aucune convention collective n'était en vigueur le 12 mai 1993 et que moins d'un an s'était écoulé depuis l'accréditation du 16 mars précédent.

Le Syndicat, pour sa part, prétendait que le délai applicable était celui de l'alinéa 24(2)d). En effet, les conventions collectives négociées en 1989 par l'Alliance et le Conseil du Trésor (alors l'employeur) pour les groupes d'employés en question, et dont les dates d'expiration se situaient en 1991, ont en fait expiré en 1993. Ces nouvelles dates d'expiration résulttaient des dispositions de la Loi sur la rémunération du secteur public fédéral (S.C. 1991, c. 30), sanctionnée le 1<sup>er</sup> octobre 1991 (ci-après la Loi). Selon le Syndicat, cette loi a eu pour

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## Summary

Syndicat des Employé-e-s des Aéroports de Montréal (CSD), applicant, Aéroports de Montréal, respondent, and Public Service Alliance of Canada, certified bargaining agent.

Board File: 555-3591  
Decision No. 1038

On May 12, 1993, the Board received from the Syndicat des Employé-e-s des Aéroports de Montréal (CSD) (the Syndicat) a certification application seeking to represent the technical and operational employees working for the Aéroports de Montréal. This employer has been managing, since August 2, 1993, the Dorval and Mirabel airports, after these airports were transferred pursuant to the Airport Transfer (Miscellaneous Matters) Act, assented to March 19, 1992.

The Public Service Alliance of Canada (PSAC) was certified on March 16, 1993 to represent that group of employees. The certification was issued to PSAC following an application it filed under section 47 of the Code, which allows a union or an employer to ask the Board to review the bargaining structure when a portion of the public service of Canada becomes subject to Part I of the Code.

PSAC objected to the timeliness of the certification application on the grounds that the latter had not been filed within the deadline provided in section 24(2)(b) of the Code, since according to PSAC, there was no collective agreement on May 12, 1993, and since less than a year had elapsed since the certification of March 16.

The Syndicat, for its part, claimed that the applicable deadline was the one provided in section 24(2)(d). The collective agreements negotiated for those groups of employees in 1989 by PSAC and Treasury Board (the employer at the time), and that were to expire in 1991, had in fact expired in 1993. The new expiration dates resulted from the Public Sector Compensation Act (S.C. 1991, c. 30), assented to October 1<sup>st</sup>, 1991 (hereinafter the Act). According to the Syndicat, this Act extended for two years the agreements applicable to these employees.

effet de proroger pour une période de deux ans les conventions applicables à ces employés. La demande d'accréditation du 12 mai 1993 était donc recevable aux termes de l'alinéa 24(2)d).

Selon l'Alliance, la Loi n'a pas eu pour effet de proroger les conventions collectives en question; elle ne prorogeait que les régimes de rémunération et les autres conditions de travail qui y étaient prévues, et les conventions collectives ont effectivement expiré en 1991. Comme aucune convention collective n'était en vigueur le 12 mai 1993, le délai applicable serait celui de l'alinéa 24(2)b) et non celui de l'alinéa (24(2)d).

Le Conseil a décidé que la Loi avait eu pour effet de proroger les conventions collectives en question, lesquelles ont en fait expiré à des dates se situant entre le 13 mars 1993 et le 4 août 1993. Il a donc décidé que la présente demande d'accréditation était recevable aux termes de l'alinéa 24(2)d) du Code.

Pour rendre sa décision, le Conseil a tenu compte du contexte d'adoption de cette loi, notamment des débats parlementaires qui l'ont précédée, et a examiné des lois connexes ou de même nature, notamment la Loi anti-inflation de 1975 et la Loi sur les restrictions salariales du secteur public de 1982. Il a aussi tenu compte du comportement antérieur des parties quant à l'interprétation qu'elles ont elles-mêmes donné à l'effet de la Loi sur la prolongation des conventions collectives à certaines époques qui ont précédé le présent litige.

Le Conseil a décidé d'inclure dans l'unité de négociation les employés saisonniers temporaires, étant donné que ces employés partagent avec les autres employés une communauté d'intérêts suffisante. Il a exclu de l'unité les étudiants qui travaillent l'été seulement.

Le Conseil a accrédité le Syndicat sans tenir un scrutin de représentation, puisque le Syndicat a établi qu'il détenait la représentativité requise le 12 mai 1993 et qu'une majorité d'employés de l'unité de négociation avait, à cette date, retiré son adhésion à l'Alliance. Le syndicat a produit à cet effet des démissions avec sa demande d'accréditation.

Consequently, the certification application filed on May 12, 1993 was timely pursuant to section 24(2)(d).

According to PSAC, the Act did not extend the life of the collective agreements; it only extended the wage scales and other terms and conditions of employment that were provided, and the collective agreements expired in fact in 1991. As there was no collective agreement on May 12, 1993, the applicable deadline was the one provided by section 24(2)(b) and not by section 24(2)(d).

The Board found that the Act extended the life of the applicable collective agreements, which in fact expired between March 13, 1993 and August 4, 1993. It therefore concluded that the instant certification application was timely under section 24(2)(d) of the Code.

In issuing its decision, the Board considered the context in which the Act was passed, including the House of Commons Debates which preceded the Act, and examined other relevant pieces of legislation, for example the Anti-Inflation Act of 1975 and the Public Sector Compensation Restraint Act of 1982. It also considered all the parties' previous behaviour with respect to the interpretation they gave to the impact of the Act on the extension of the life of the collective agreements during certain periods before this dispute.

The Board decided to include in the bargaining unit the temporary seasonal employees, since they share sufficient interests with other employees. It excluded from the unit the students who only work during the summer.

The Board certified the Syndicat without a representation vote, since the Syndicat has established that it had the necessary representative character on May 12, 1993 and that a majority of members of the bargaining unit had, at that date, withdrawn their support from PSAC, shown by the letters of resignation filed with the application.

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Travail

Reasons for decision

Syndicat des Employé-e-s des  
Aéroports de Montréal (CSD),

*applicant,*

*and*

Aéroports de Montréal,

*employer,*

*and*

Public Service Alliance of  
Canada,

*certified bargaining agent.*

Board File: 555-3591

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The Board was composed of Ms. Louise Doyon, Vice-Chair, and Mr. Robert Cadieux and Ms. Véronique L. Marleau, Members.

Appearances

Mr. André Thibaudeau, for the Syndicat des Employé-e-s des Aéroports de Montreal (CSD);

Mr. Rino Parent, Director of Labour Relations and Occupational Safety and Health, for the employer; and Mr. Andrew Raven, for the Public Service Alliance of Canada.

These reasons for decision were written by Ms. Louise Doyon, Vice-Chair.

These reasons are further to an interim decision issued under section 20(1) of the Canada Labour Code (Part I - Industrial Relations) on September 29, 1993. At that time, the Board certified the Syndicat des Employé-e-s des Aéroports de Montréal (the Syndicat) to represent the technical and operational employees working for Aéroports de Montréal (the employer). It then informed the parties that the reasons for its decision would be communicated to them later.

I

The Application for Certification

A. The Context

On May 12, 1993, the Syndicat filed an application for certification to represent the above-mentioned group of employees. On that date, the Public Service Alliance of Canada (PSAC) was the bargaining agent of these employees, having been certified by the Board on March 16, 1993.

The certification order of March 16, 1993 rescinded and replaced seven certification certificates held by PSAC under the Public Service Staff Relations Act in respect of various categories of technical and operational employees of the employer. These employees had been transferred to Aéroports de Montréal on August 2, 1992, when the management of the Dorval and Mirabel airports was transferred to this new employer. The transfer took place following the coming into force of the Airport Transfer (Miscellaneous Matters) Act (S.C. 1992, c. 5), assented to on March 19, 1992 (the Airport Act), which authorizes the Minister of Transport to transfer an airport to an airport authority constituted under said Act.

The certification order of March 16, 1993, which recognized as appropriate for collective bargaining a single unit comprised of the employees concerned, was granted further to an application filed by PSAC on August 14, 1992 under section 47(3) of the Code and section 6 of the Airport Act.

B. The Positions of the Parties

PSAC objected to the timeliness of the application for certification of May 12, 1993 on the ground that it had not been filed within the time limit specified in section

24(2)(b) of the Code. The Syndicat, for its part, alleged that the applicable time limit was the one specified in section 24(2)(d).

Sections 24(1) and (2) of the Code state the following concerning the time limits for filing an application for certification:

"24.(1) A trade union seeking to be certified as the bargaining agent for a unit that the trade union considers constitutes a unit appropriate for collective bargaining may, subject to this section and any regulations made by the Board under paragraph 15(e), apply to the Board for certification as the bargaining agent for the unit.

(2) Subject to subsection (3), an application by a trade union for certification as the bargaining agent for a unit may be made

(a) where no collective agreement applicable to the unit is in force and no trade union has been certified under this Part as the bargaining agent for the unit, at any time;

(b) where no collective agreement applicable to the unit is in force but a trade union has been certified under this Part as the bargaining agent for the unit, after the expiration of twelve months from the date of that certification or, with the consent of the Board, at any earlier time;

(c) where a collective agreement applicable to the unit is in force and is for a term of not more than three years, only after the commencement of the last three months of its operation; and

(d) where a collective agreement applicable to the unit is in force and is for a term of more than three years, only after the commencement of the thirty-fourth month of its operation and before the commencement of the thirty-seventh month of its operation and, thereafter, only

(i) during the three month period immediately preceding the end of each year that the collective agreement continues to operate after the third year of its operation, and

(ii) after the commencement of the last three months of its operation."

(emphasis added)

According to PSAC, no collective agreement was in force on May 12, 1993 and because less than a year had passed since

certification on March 16, 1993, the application was untimely under section 24(2)(b).

The Syndicat, for its part, argued that the applicable time limit was the one specified in section 24(2)(d). The collective agreements, which were negotiated in 1989 between PSAC and Treasury Board (the employer at the time) for the groups of employees in question and whose expiry dates ranged from March 13, 1991 to August 4, 1991, had in fact expired on the days specified, but in 1993. These new expiry dates resulted from the Public Sector Compensation Act (S.C. 1991, c. 30), assented to on October 1, 1991 (the 1991 Act). This Act extended, for a period of two years beyond their respective expiry dates, the collective agreements applicable to these employees. Thus, argued the Syndicat, the application for certification of May 12, 1993 was timely under section 24(2)(d).

According to PSAC, the 1991 Act did not extend these collective agreements. It in fact extended only the compensation plans and the other terms and conditions of employment provided for in these agreements, and the collective agreements had in fact expired in 1991. Consequently, since none of the applicable collective agreements were in force on May 12, 1993, the applicable time limit was the one specified, not in section 24(2)(d), but in section 24(2)(b).

The employer took no position on the timeliness of the application for certification.

These reasons for decision deal with a number of questions: the timeliness of the application for certification; the inclusion in or exclusion from the bargaining unit of temporary seasonal employees and students; and the representative character of the unions concerned.

II

The Timeliness of the Application for Certification of May 12, 1993

The Board, to dispose of the timeliness issue, must determine whether, on May 12, 1993, one or more of the collective agreements still applied to the group of employees concerned. To this end, it must determine, inter alia, whether the 1991 Act extended until 1993 the collective agreements negotiated in 1989 or merely extended the terms and conditions of employment, without altering the original expiry dates of the collective agreements. The Board's decision on this issue cannot, however, be clearly understood without reviewing the circumstances that led to PSAC's certification on March 16, 1993.

On August 14, 1992, PSAC filed three applications for certification as bargaining agent for three groups of employees who work for the employer: the technical and operational employees (at issue here); the administrative employees; and the firefighters. These applications were filed pursuant to section 47 of the Code, specifically section 47(3), and section 6 of the Airport Act.

Section 47 of the Code reads as follows:

"47. (1) Where the Governor in Council deletes the name of any portion of the public service of Canada specified from time to time in Part I or II of Schedule I to the Public Service Staff Relations Act and that portion of the public service of Canada is established as or becomes a part of a corporation to which this Part applies, or where a portion of the public service of Canada included in a portion of the public service of Canada so specified in Part I or II of Schedule I to that Act is severed from the portion in which it was included and established as or becomes a part of a corporation to which this Part applies,

(a) a collective agreement that applies to any employees in that portion of the public service of Canada and that is in force at the time the portion of the public service of Canada is

established as or becomes a part of such a corporation continues in force, subject to subsections (3) to (7), until its term expires; and

(b) the Public Service Staff Relations Act applies in all respects to the interpretation and application of the collective agreement.

(2) A trade union may apply to the Board for certification as the bargaining agent for the employees affected by a collective agreement referred to in subsection (1), but may so apply only during a period in which an application for certification of a trade union is authorized to be made under section 24.

(3) Where the employees in a portion of the public service of Canada that is established as or becomes a part of a corporation to which this Part applies are bound by a collective agreement, the corporation, as employer of the employees, or any bargaining agent affected by the change in employment, may, not later than thirty days after the date the portion of the public service of Canada is established as or becomes a part of the corporation, apply to the Board for an order determining the matters referred to in subsection (4).

(4) Where an application is made under subsection (3) by a corporation or bargaining agent, the Board, by order, shall

(a) determine whether the employees of the corporation who are bound by any collective agreement constitute one or more units appropriate for collective bargaining;

(b) determine which trade union shall be the bargaining agent for the employees in each such unit; and

(c) in respect of each collective agreement that applies to employees of the corporation,

(i) determine whether the collective agreement shall remain in force, and

(ii) if the collective agreement is to remain in force, determine whether the collective agreement shall remain in force until the expiration of its term or expire on such earlier date as the Board may fix.

(5) Where the Board determines, pursuant to paragraph (4)(c), that a collective agreement shall remain in force, either party to the collective agreement may, not later than sixty days after the date the Board makes its determination, apply to the Board for an order granting leave to serve on the other party a notice to bargain collectively.

(6) Where no application for an order is made pursuant to subsection (3) within thirty days after the date a portion of the public service of Canada is established as or becomes a part of a corporation to which this Part applies, the corporation, as employer of the employees, or any bargaining agent bound by a collective agreement

that, by subsection (1), is continued in force, may, during the period commencing on the thirty-first day and ending on the ninetieth day after the date the portion of the public service of Canada is established as or becomes a part of the corporation, apply to the Board for an order granting leave to serve on the other party a notice to bargain collectively.

(7) Where the Board has made an order pursuant to paragraph (4)(c), this Part applies to the interpretation and application of any collective agreement affected thereby."

(emphasis added)

Section 6 of the Airport Act reads as follows:

"6.(1) Subject to subsection (2), where the Minister has sold, leased or otherwise transferred an airport to a designated airport authority, a collective agreement or arbitral award that applies to any designated employees for the airport and is in force on the transfer date shall continue thereafter in force until its term expires, and the Public Service Staff Relations Act continues to apply in all respects to the interpretation and application of the agreement or award.

(2) Subsections 47(2) to (7) of the Canada Labour Code apply in respect of a collective agreement or arbitral award continued by subsection (1) as if it were a collective agreement referred to in those subsections.

(3) For greater certainty, a collective agreement or arbitral award continued by subsection (1) is deemed to be a collective agreement within the meaning of section 49 of the Canada Labour Code, and Part I of that Act, other than section 80, applies in respect of the renewal or revision of the collective agreement or the entering into of a new collective agreement."

(emphasis added)

On August 31, 1992, the employer applied, pursuant to section 47(4)(a), for a review of the configuration of the bargaining units it had inherited following the transfer.

Recourse to section 47(3) and its application presuppose that the employees concerned are bound by a collective agreement, which is also a requirement of section 6 of the Airport Act, which essentially repeats the rules in section 47 of the Code and makes reference to it.

During consideration of the applications of August 1992, no party questioned the existence of collective agreements applicable to these groups of employees. This is understandable because there must be a collective agreement in force before this recourse per se can be exercised. Since the parties themselves exercised this recourse in order to request the Board's intervention, they did not raise this question and it must be assumed that they were acknowledging that one or more collective agreements were in force on August 2, 1992. These are the collective agreements that were extended by the 1991 Act and the applicability of which PSAC is contesting in these proceedings. Moreover, the Board did not determine at the time the term of these collective agreements, which it would have been required to do had it received an application under section 47(4)(c).

PSAC's decision to invoke, in August 1992, section 47 to ask the Board to certify it following the enactment of the Airport Act indicates to the Board that PSAC recognized, at least implicitly, that the 1991 Act had extended the collective agreements. This being the case, the Board, in this case, could have disregarded PSAC's opposition and dismissed it without further comment. However, it considered it appropriate to explain the reasons for its decision of September 29, 1993.

A. The 1991 Act and the Extension of the Collective Agreements

The 1991 Act came into force on October 1, 1991, when bargaining for renewal of the collective agreements between the federal public service unions and Treasury Board was at an impasse. On this date, pressure tactics, including a strike, had already been used.

Section 5 of the 1991 Act extends for two years compensation plans that applied, on February 26, 1991, to employees to whom the Act applied and who, on that date, belonged to the groups of employees transferred to the present employer on August 2, 1992.

This text is clear and raises no interpretation problems. That is not the case with sections 7(1) and 8. The interpretation problems concerning the effect of the Act, namely whether or not it extends the collective agreements, result from the ambiguity of the text of these sections.

The English and French versions of these sections read as follows:

"7.(1) Notwithstanding any other Act of Parliament except the Canadian Human Rights Act but subject to this Act, the terms and conditions of

(a) every compensation plan that is extended under section 5 or 6, and

(b) every collective agreement or arbitral award that includes a compensation plan referred to in paragraph (a)

shall continue in force without change for the period for which the compensation plan is so extended.

...

8. The parties to a collective agreement, or the persons bound by an arbitral award, that includes a compensation plan that is extended under section 5 or 6 may, by agreement in writing, amend any terms and conditions of the collective agreement or arbitral award, other than wage rates or other terms and conditions of the compensation plan.

7.(1) Par dérogation à toute autre loi fédérale, à l'exception de la Loi canadienne sur les droits de la personne, mais sous réserve des autres dispositions de la présente loi, les dispositions d'un régime de rémunération prorogé en vertu des articles 5 ou 6 ou d'une convention collective ou décision arbitrale qui comporte un pareil régime demeurent en vigueur sans modification pendant la période de prorogation.

...

8. Les parties à une convention collective ou les personnes liées par une décision arbitrale, qui comporte un régime de rémunération prorogé en vertu des articles 5 ou 6 peuvent convenir par écrit de modifier les dispositions de la convention ou de la décision, à l'exception des taux de salaire et des autres dispositions du régime."

(emphasis added)

Section 7(1) seems to indicate clearly that the provisions of a collective agreement continue in force without change for a specified period. Moreover, although section 8 authorizes parties to a collective agreement to amend its contents, with the exception of the compensation plan, it does not specify that the agreement is extended. However, this does not rule out the conclusion that this section may imply the existence of a collective agreement.

Where a statutory provision is ambiguous, as is the case here, the Board must try and determine Parliament's intent, having regard to the applicable principles of interpretation. The Board must therefore define the purpose of the statute and interpret its ambiguous provisions, in accordance with section 12 of the Federal Interpretation Act, R.S.C., 1985, c. I-21, which reads as follows:

"12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

To this end, the Board can refer to elements other than the sole wording of the statute. It can consult among other things, the preparatory works and parliamentary debates that preceded enactment of the statute to be interpreted, related statutes or statutes of the same type enacted by Parliament (or other legislatures), as well as the interpretation that the courts have given to them. This is what we did in this case.

(1) The Preparatory Works and Parliamentary Debates

In Canada (Attorney General) v. Young, [1989] 3 F.C. 647; and (1989), 100 N.R. 333 (C.A.), the Federal Court of Appeal held that it was appropriate to consult the parliamentary debates "in order to ascertain the 'mischief' or 'evil' that

a particular enactment was designed to correct" (pages 657; and 338). [See also Canada Post Corp. v. Canadian Union of Postal Workers et al. (1988), 82 N.R. 249 (F.C.A.); Jacques Paul v. The Queen, [1982] 1 S.C.R. 621.]

The House of Commons Debates shed light on the context in which the 1991 Act was enacted, in particular on the objectives sought and the means chosen to attain them. On September 17, 1991, during second reading, the Honourable Gilles Loiselle, Treasury Board President and Minister of State for Finance, after citing the government's decision to keep the 1991-92 salary budgets at the same level as those of the previous fiscal year and to reduce the number of jobs in proportion to the total wage increase negotiated for that period, explained to the House that the unions had refused to accept work-force reductions in return for wage increases. Given this situation, the government therefore had to implement the Public Sector Compensation Restraint Program. The Minister had the following to say on the subject:

*"These measures are made necessary by the weak state of the economy and the government's deteriorating fiscal situation. The government cannot afford wage increases this fiscal year and no money has been provided for such increases."*

*It is clear that the Public Sector Wage Restraint Program, also known as 0-3, was necessary, considering the financial and economic situation. However, I agree that the program has dealt a heavy blow to the government's wage guidelines and to collective bargaining in the Public Service. I also agree that collective bargaining negotiations have been very difficult for Public Service unions this year.*

*From the outset, I had hoped to negotiate wage settlements within the 0-3 guidelines by offering some flexibility on non-wage proposals, but throughout the bargaining process it was also clear that we might have to resort to a legislated settlement in the interests of all parties concerned."*

(House of Commons Debates, Official Report (Hansard), Vol. 132, no. 29, 3rd Session, 34th Parliament, September 17, 1991, pages 2220 and 2221)

With regard to the measures adopted by the government to ensure implementation of its program, Minister Loiselle added the following:

"... this bill seeks to implement the program only the first two years and to permit the resumption of full collective bargaining as soon as possible."

(House of Commons Debates, Official Report (Hansard), Vol. 132, no. 38, 3rd Session, 34th Parliament, September 17, 1991, page 2221; emphasis added)

Relying on this statement, he later explained:

"The bill imposes a two-year extension on all collective agreements and all prior compensation plans. This means that all present strike activities will be illegal. As soon as the legislation comes into force, all union members now on strike will have to return to work. The bill provides for stiff fines for union leaders and employees who refuse to go back to work or recommend continuing the strike..."

(page 2221; emphasis added)

The mandatory collective bargaining process was replaced by a voluntary consultation process that enabled the parties to amend the collective agreements extended by legislation:

"The bill does not suspend all aspects of collective bargaining in the Public Service. I want to emphasize that it explicitly excludes benefits and services provided under the terms of policies arrived at through consultation under the auspices of the National Joint Council of the Public Service.

The NJC is a union-management consultative body that brings together the leaders of all the Public Service unions and officials of the Treasury Board to agree upon policies that then become annexes to all collective agreements. . . ."

(page 2222; emphasis added)

We will see later that PSAC and Treasury Board used this process to amend the master and specific group agreements in the area of dental insurance.

The manner in which the government itself described the objectives of the 1991 Act, and its own perception of the effects of this Act, while not in themselves decisive, have led the Board to interpret the 1991 Act as extending the collective agreements, and not only their provisions.

(2) Related Legislation Enacted by Parliament and its Interpretation in Jurisprudence

The Board, in interpreting the 1991 Act, also considered comparable statutes or statutes of the same type as the one at issue here. It thus tried to ensure that its interpretation observed the principle of the presumption of coherence between statutes that relate to the same or comparable subject matter, in order to favour harmony between statutes.

In practice, the presumption of coherence means that a provision is presumed to have the same meaning in all statutes dealing with the same subject matter. However, this is merely a presumption that can be refuted explicitly or implicitly by the text of the statute or by the context. As Professor Pierre-André Côté states in The Interpretation of Legislation in Canada, 2nd ed. (Cowansville, Que.: Les Éditions Yvon Blais Inc., 1991):

".... Because a word's meaning is derived from its context, it is hazardous to shift from one law to another without making adjustments dictated by the new context..."

(page 291)

In 1975 and 1982, the federal government imposed through legislation, wage restraint programs in order to curb inflation. In this sense, the 1991 Act is not the first of its kind. The Anti-Inflation Act of 1975 (S.C. 1974-75-76, c. 75), assented to on December 15, 1975, had such a

purpose, although its scope was different from that of the Public Sector Compensation Restraint Act of 1982 (S.C. 1980-81-82-83, c. 122) (the 1982 Act) assented to on August 4, 1982. We will return to these distinctions later.

For the time being, it should be noted that, with a few exceptions, the 1991 Act contains almost all provisions of the 1982 Act. More particularly, sections 7(1) and 8 of the 1991 Act reproduce almost verbatim sections 6(1) and 7 of the 1982 Act, which read as follows:

*"6.(1) Notwithstanding any other Act of Parliament except the Canadian Human Rights Act but subject to this section and section 7, the terms and conditions of*

- (a) every compensation plan that is extended under section 4 or 5, and*
- (b) every collective agreement or arbitral award that includes such a compensation plan,*

*shall, subject to this Part, continue in force without change for the period for which the compensation plan is extended.*

...

*7. The parties to a collective agreement, or the persons bound by an arbitral award, that includes a compensation plan that is extended under section 4 may, by agreement, amend any terms and conditions of the collective agreement or arbitral award other than wage rates or other terms and conditions of the compensation plan."*

The interest in focusing on the 1982 Act lies in the fact that the Supreme Court of Canada, and the Federal Court before it, had to interpret it after PSAC challenged its constitutionality on the ground that it contravened the Canadian Charter of Rights and Freedoms. According to PSAC, because this statute extended the collective agreements and withdrew the right to strike, it had suppressed the right to collective bargaining, thereby violating the freedom of association of public sector employees. There was no disagreement over the fact that the 1982 Act had extended the collective agreements, and all the courts analyzed the

constitutionality of this statute on the assumption that it had this effect. This is confirmed by the analysis done by the Trial Division of the Federal Court in P.S.A.C. v. The Queen, [1984] 2 F.C. 562:

"... Section 6 of the Restraint Act continues not only the terms and conditions of the compensation plan part of a collective agreement, but also 'the terms and conditions of ... (b) every collective agreement ... that includes such a compensation plan....' Thus, by extending the life of collective agreements for two years, and in some cases more, the Act removed the right to strike during that period.

Thus, the plaintiff argued the Restraint Act destroyed collective bargaining."

(page 573; emphasis added)

Relying on this interpretation, the Court agreed that:

"... the settling of disputes, arising in the negotiation of new collective agreements, by means of a binding decision of an arbitration board, or by means of non-binding recommendations through a conciliation process, was no longer possible. ..."

(page 572)

The Court concluded as follows:

*"Indeed the role of these bodies with respect to collective bargaining is implicitly overridden by section 6 of the Restraint Act..."*

(page 572)

The Trial Division of the Federal Court dismissed PSAC's arguments concerning the violation of freedom of association, but accepted the arguments that, in extending the collective agreements and not only some of their provisions, the 1982 Act had the effect of suppressing the right to bargain collectively. The Federal Court of Appeal affirmed this judgment in Public Service Alliance of Canada v. The Queen, [1984] 2 F.C. 889, which in turn was affirmed by the Supreme Court of Canada in PSAC v. Canada, [1987] 1

S.C.R. 424.

The opinion of the Supreme Court of Canada concerning the meaning of sections 6 and 7 of the 1982 Act was expressed by Mr. Justice Dickson (then Chief Justice). It should be noted, however, that the Court did not share his dissenting opinion concerning the restrictive effect of the Act on freedom of association. Chief Justice Dickson described as follows the practical effect of the 1982 Act:

*"For present purposes, it is sufficient to observe that s. 6(1)(a), by continuing in force the terms and conditions of compensation plans, precludes collective bargaining on compensatory components of collective agreements. Section 6(1)(b) similarly precludes collective bargaining on all issues, including non-compensatory matters, subject to the operation of s. 7. As I understand s. 7, it permits the parties to a collective agreement to amend non-compensatory terms and conditions by agreement only. It does not, in my view, authorize employees to strike or to submit proposed amendments to binding arbitration."*

(page 433; emphasis added)

In his analysis of the effects of the 1982 Act on the collective bargaining system, Chief Justice Dickson adopted Professor D.D. Carter's description of the effects of this statute in his study Collective Bargaining and Income Restraint Programs: The Legal Issues, in "Recent Public Sector Restraint Program: Two Views", Reprint Series No. 53 (Kingston: Queen's University, Industrial Relations Centre, 1984):

*"The 1982 income restraint programs were a significant departure from their 1975 predecessor. While the earlier Anti-Inflation Act reached both the public and private sectors, it was not as blunt an instrument as the public sector restraint legislation of 1982, as it at least attempted to accommodate existing collective bargaining structures by allowing collective bargaining to continue within a framework of controls. Guidelines were promulgated and, although bargaining settlements were expected to fall within these guidelines, it was also possible for exemptions to be made. Although the Canadian collective bargaining*

structure did not co-exist in complete harmony within this system of wage restraints, it at least continued to function during this first period of income restraint."

(page 1; reproduced in PSAC v. Canada, supra, page 450)

After this excerpt cited by Chief Justice Dickson, Professor Carter added the following concerning certain distinctions between the 1975 Act and the 1982 Act:

"The 1982 restraint legislation had a more drastic effect on collective bargaining. The federal government's Public Sector Compensation Restraint Act effectively displaced collective bargaining for a period of two years as collective agreements covering employees of the federal public service, federal crown corporations and firms which bargained in conjunction with crown corporations were simply extended for two years by statute, and increases of 6 percent in the first year and 5 percent in the second year were imposed upon the employees covered by these agreements. The provincial programs for public sector wage restraint were similar in thrust, suspending collective bargaining during the period of the restraint program by imposing a specific wage increase determined by legislation."

(page 1; emphasis added)

PSAC brought to the Board's attention the judgment of the Ontario Court of Appeal in Re Service Employees International Union, Local 204 and Broadway Manor Nursing Home et al. (1984), 13 D.L.R. (4th) 220, rendered on October 22, 1984. In that case, the Court held that provisions similar to sections 7(1) and (8) of the 1991 Act contained in the Inflation Restraint Act, 1982 (Ontario), c. 55. ss. 13, 15 (the Ontario Act), did not extend the collective agreements but only certain of their provisions and therefore maintained intact negotiation of the other terms and conditions of employment. That judgment reversed the judgment of the Divisional Court, which had concluded that these provisions extended the collective agreements and suspended collective bargaining.

The majority of the Supreme Court, in Public Service Alliance of Canada, supra, did not analyze the effect of the provisions of the Ontario Act or the judgments in question. Chief Justice Dickson, for his part, accepted the Divisional Court's interpretation.

The Board did not accept the Ontario Court of Appeal's analysis of the effects of the Ontario Act on the extension of the collective agreements, as PSAC hoped it would in this case. It therefore followed the approach of Chief Justice Dickson, and also took into account the fact that this Act of December 15, 1982 followed the federal Act of August 4, 1982. In this sense, it cannot serve as a guide in determining Parliament's intention in enacting the 1982 Act.

It is clear, then, that the courts have interpreted the 1982 Act by adopting the basic tenet that that statute extended the collective agreements. The Board gave the same interpretation to the disputed provisions of the 1991 Act. This means that the collective agreements were still in force on August 2, 1992 and that they applied to the employees transferred to Aéroports de Montréal under section 47 of the Code and section 6 of the 1992 Act.

#### B. The 1991 Act and the Conduct of the Parties

In determining the effect of the 1991 Act, the Board also considered the conduct displayed by the parties at different times.

With regard to the 1982 Act, PSAC claimed that it had extended the collective agreements. In August 1992, it gave a similar interpretation to comparable provisions of the 1991 Act when it invoked section 47 of the Code which, as we saw, presupposes the existence of a collective agreement. Moreover, in a case specifically involving PSAC and the

National Museum of Science and Technology (file no. 590-5), the Board has already had to determine the effect of the 1991 Act on the extension of the collective agreements, the matter at issue here. In that case, the employer had filed an application under section 47(3), following the coming into force of the Museums Act (S.C. 1990, c. 3), assented to on January 30, 1990. That statute constituted as Crown corporations certain national museums previously under the federal public service. When it considered the case, the Board decided on July 16, 1992 that the provisions of the 1991 Act had extended for a two-year period, effective their respective expiry dates, the collective agreements applicable to the employees of the various museums. These agreements were, among others, the same agreements as those at issue here. The Board also decided at that time that the public order nature of the 1991 Act precluded it from exercising its discretion under section 47(4)(c) to amend the term of the collective agreements (National Museum of Science and Technology, July 16, 1992 (LD 1048)). That decision was not the subject of an application for review under section 18 of the Code.

In this case, PSAC did not explain to the Board why it should disregard, in interpreting the 1991 Act, its July 1992 decision, or why it should disregard the interpretation given by the Supreme Court of Canada to the 1982 Act. Nor did PSAC explain to the Board why, in this case, it took a position different from the one it had taken previously, specifically in support of its applications filed in August 1992.

Moreover, as part of its investigation into the application for certification, the Board examined the wording of the collective agreements that applied to the employees concerned on May 12, 1993.

The employer filed the collective agreements for the following groups: General Services (supervisory and non-supervisory); Drafting and Illustration; Heating, Power and Stationary Plant Operation; Engineering and Scientific Support; General Labour and Trades (supervisory and non-supervisory). PSAC sent the Board copies of the agreement for the General Technical Group and copies of the extensions for all the above-mentioned groups, with the exception of the Engineering and Scientific Support Group (EG). The Board, as it told the parties in a letter dated September 15, 1993, obtained from Treasury Board the text of the extension for the latter group.

The extension documents state that, as a result of the coming into force of the 1991 Act, Treasury Board conducted what could be termed an "update" of the rates of pay contained in the collective agreements applicable to the various groups of employees. The documents became an integral part of the collective agreements, as the preamble to them indicates. The following is one such preamble:

"In accordance with the Public Sector Compensation Act (Bill C-29), the collective agreement for all employees in the Engineering and Scientific Support Group is extended for a period of 24 months."

The expiry date of this agreement will be June 21, 1993.

The revised rates of pay and pay notes, established in accordance with the provisions of the above-mentioned legislation, become effective on the date indicated.

This material, including the Memorandum of Understanding on the Dental Care Plan, is to be inserted into your existing collective agreement."

(emphasis added)

This Memorandum of Understanding, reproduced on the last page of the update, reads as follows:

"In accordance with Article M-42 - Agreement Reopener of the Master Agreement, the parties agree to reopen and amend Article M-41 - Dental Care Plan to reflect the following Language:

The Dental Care plan as contained in the Master Agreement between the Treasury Board and the Public Service Alliance of Canada, with an expiry date of June 30, 1988, and as amended by the terms and conditions of the Dental Care Plan agreement between the Public Service Alliance of Canada and the Treasury Board, signed on March 10, 1988, and as amended by the Dental Care Plan agreement between the Treasury Board and the Public Service Alliance of Canada signed on December 12, 1991, shall be deemed to form part of the Master Agreement of May 17, 1989, the provisions of which expire on the expiry dates of the Group Specific collective agreements as extended by the Public Sector Compensation Act.

SIGNED AT OTTAWA, this 31st day of the Month of December, 1991.

ON BEHALF OF THE  
TREASURY BOARD  
OF CANADA

ON BEHALF OF THE  
PUBLIC SERVICE  
ALLIANCE OF CANADA

---

Jean Guy Fleury  
Acting Deputy Secretary

---

Daryl T. Bean  
President"

This particular amendment to the collective agreements constitutes, in the Board's opinion, an explicit admission that PSAC considered, at least at the time, that the 1991 Act had extended the collective agreements negotiated in 1989 and not merely certain provisions of these collective agreements. The Act gave the parties the possibility of agreeing to amend certain provisions of these collective agreements, which is what PSAC did.

In earlier decisions, the Board considered the parties' conduct in dealing with questions before it. For example, in Ghislaine Otis et al. (1987), 72 di 7; 19 CLRBR (NS) 16; and 88 CLLC 16,004 (CLRB no. 657), it had considered the interpretation that the union itself had given concerning the term of the collective agreement in dismissing the union's objection to the timeliness of an application for revocation. It had stated the following:

"... the evidence gathered by the Board shows that the union itself considered that the collective agreement expired on May 31, 1987."

(page 15)

The Board had pointed out that the certainty that must exist concerning the expiry date of a collective agreement serves an important purpose:

"... to ensure that third parties and employees can easily and clearly identify the open period of a collective agreement, so that they can exercise the basic rights conferred on them by sections 110, 124 and 137 of the Code, namely, the right of employees to belong to the association of their choice, to replace a bargaining agent, or to get rid of one."

(page 14)

For all these reasons, the Board found that the application for certification of May 12, 1993 was timely because it was filed within the time limit specified in section 24(2) (d) of the Code.

### III

#### The Composition of the Bargaining Unit

The parties were at odds over the inclusion in the bargaining unit of two categories of employees: the temporary seasonal employees and the students.

As the Board explained in its September 29 decision, it considered that the employees in the first category, although hired for a specific period, are employees within the meaning of the Code who share with the other employees the community of interest that is necessary for inclusion in the bargaining unit sought. The terms and conditions of employment of these persons could be given special consideration during the bargaining process, if the parties choose to do so. However, they have not been considered in

determining the union's representative character because no employee in this category was working on the date on which the application was filed. As for the students who work only during the summer, the Board did not include them in the bargaining unit.

IV

The Unions' Representative Character

Where a union wishes to replace a certified bargaining agent, it must demonstrate to the Board that, on the date on which it files its application, it has the support of a majority of employees, that is, of more than 50% of the group represented by the certified bargaining agent. The Board established this rule and consistently applied it. (See CJMS Radio Montréal (Québec) Limitée (1978), 33 di 393; and [1980] 1 Can LRBR 270 (CLRB no. 151); and Canadian Pacific Express and Transport (1988), 73 di 183 (CLRB no. 682).)

Moreover, the Board orders, as a rule, a representation vote to choose between the applicant union and the certified bargaining agent if it is satisfied that the two unions represent, on the date of the application, a majority of employees. This rule does not apply if the certified bargaining agent has lost its representative character, in particular following the resignation of a sufficient number of its members. The Board can then certify the applicant union without holding a representation vote. (See Maple Leaf Mills Limited (1978), 23 di 114 (CLRB no. 128); and Bell Canada (1979), 30 di 112; [1979] 2 Can LRBR 435 (CLRB no. 192).)

In this case, the Syndicat established that it possessed, on May 12, 1993, the required representative character and that a sufficient number of employees in the bargaining unit had

withdrawn their support from PSAC as of that date. The Syndicat produced resignations to this effect in support of its application for certification.

In the circumstances, the Board found that there was no reason to hold a representation vote and certified the Syndicat to represent the group previously represented by PSAC. The wording of the certification order is the same as that of the March 16, 1993 certification order, subject to the Board's decision concerning temporary seasonal employees and summer students.

Louise Doyon  
Louise Doyon  
Vice-Chair

Robert Cadieux  
Robert Cadieux  
Member

V.L. Marleau  
Véronique L. Marleau  
Member

ISSUED at Ottawa, this 18th day of November 1993.

CCRT/CLRB - 1038

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## Summary

Canada Post Corporation,  
applicant/respondent, and Public  
Service Alliance of Canada,  
applicant/respondent.

Board Files: 530-1218  
530-1481  
530-2203

Decision no. 1039

## Résumé

Société canadienne des postes,  
requérante/intimée, et Alliance de la  
Fonction publique du Canada,  
requérante/intimée.

Dossiers du Conseil: 530-1218  
530-1481  
530-2203

Décision n° 1039

This is an interim decision rendered  
pursuant to section 20 of the Canada  
Labour Code, in which the Board  
gives the reasons for which it is  
issuing a certification order to the  
Public Service Alliance of Canada.

Il s'agit d'une décision partielle  
rendue par le Conseil en vertu de  
l'article 20 du Code canadien du  
travail expliquant les motifs pour  
lesquels il rend une ordonnance  
d'accréditation en faveur de  
l'Alliance de la Fonction publique du  
Canada.

On June 17, 1993, the Board issued  
an order appointing Mr. Gordon  
MacIsaac, senior labour relations  
officer, Atlantic Region, to meet with  
the parties, conferring on him special  
powers to carry out investigations,  
pursuant to sections 20(1) and 16(k)  
of the Canada Labour Code.

Le 17 juin 1993, le Conseil a rendu  
une ordonnance désignant M. Gordon  
MacIsaac, agent principal des  
relations du travail, région de  
l'Atlantique, avec mandat de  
rencontrer les parties et l'investissant  
de pouvoirs d'enquête spéciaux en  
vertu du paragraphe 20(1) et de  
l'alinéa 16k) du Code canadien du  
travail.

On or about November 19, 1993, the  
Board received from the parties a  
signed memorandum of agreement.

Le ou vers le 19 novembre 1993, le  
Conseil a reçu des parties un  
mémmoire d'entente dûment signé.

This agreement is in effect  
tantamount to a voluntary recognition  
of an appropriate bargaining unit,  
within the meaning of the Code, that  
the Board sanctions by certification  
order dated November 19, 1993.

Cette entente équivaut, en fait, à une  
reconnaissance volontaire d'une unité  
de négociation appropriée, au sens du  
Code, que le Conseil entérine par  
une ordonnance d'accréditation datée  
du 19 novembre 1993.

The Board, in these reasons,  
reiterates its policy to the effect that  
it has, pursuant to powers conferred  
by the Code, the exclusive  
jurisdiction to determine all  
appropriate units and that it need not  
determine the most appropriate unit.

Le Conseil, dans les présents motifs,  
réitère sa politique selon laquelle il  
détient, en vertu des pouvoirs  
conférés par le Code, la compétence  
exclusive pour déterminer toute unité  
appropriée et qu'il n'est pas tenu de  
déterminer l'unité la plus appropriée.



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travail

Reasons for decision

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Board Files: 530-1218  
530-1481  
530-2203

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The Board was composed of Mr. M. Brian Keller, Vice-Chairman, and Messrs. Victor Gannon and Jacques Archambault, Members.

Appearances

Mr. Robert Monette, accompanied by Ms. Mary G. Gleason, for Canada Post Corporation; and

Mr. Andrew Raven, for the Public Service Alliance of Canada.

These reasons for decision were written by Mr. Jacques Archambault, Member.

This is an interim decision issued further to other Board decisions in the same files (Canada Post Corporation (1988), 73 di 66; and 19 CLRBR (NS) 129 (CLRB no. 675)), in which the Board must determine the number of bargaining units that would be appropriate for collective bargaining at Canada Post Corporation (CPC).

This interim decision is also further to another Board decision of December 12, 1989 (Canada Post Corporation (1989), 79 di 35; and 90 CLLC 16,007 (CLRB no. 767)) which was part of what is commonly called "Phase II" of these proceedings, during which the Board, in exercising its exclusive jurisdiction, had to determine the configuration of the bargaining units that remain to be defined in the present case.

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It is appropriate to recall the fundamental objectives of this exercise.

"The headnotes of its decision dated February 10, 1988 (Canada Post Corporation (675), supra, state the following:

'Board decided it was appropriate to reduce to four bargaining units the 26 units which were represented by eight agents - Board decided the following four units were appropriate: 1) the employees currently represented by CPAA should remain in a separate unit as they are separate and distinct from the rest of the operational unit, have historically approached collective bargaining differently and have different needs and desires (Board saw no advantage to either party in including them in a wider unit); 2) an operational unit (collection, transmission, delivery of mail and maintenance of equipment) consisting of those persons currently represented by LCUC, CUPW, IBEW and PSAC; 3) a white-collar administrative unit (administration, technical and professional groups), other than nurses, currently represented by PSAC and PIPS; and 4) a supervisory unit which cuts across all bargaining unit lines and consisting of persons other than first-line supervisors and lead hands.'

(emphasis added)

In an initial certification order issued on January 30, 1989, the Board determined a bargaining unit to be represented by the Canadian Union of Postal Workers (CUPW), merging into a single so-called operational unit the two previously separate units comprising letter carriers and postal workers.

In a second order, the Board maintained intact the unit then represented by the Canadian Postmasters and Assistants Association (CPAA)."

(Canada Post Corporation (1993), 93 CLLC 16,024 (CLRB no. 993), page 14,160)

Finally, on February 15, 1993, the Board published decision no. 993 and issued at the same time a certification order in the name of the Association of Postal Officials of Canada (APOC), thereby determining the third bargaining unit, the so-called "supervisory" unit.

In this decision, the Board is completing the exercise by settling and determining the configuration of the fourth unit, the so-called "administrative" (white-collar) unit.

In February 1993, three days after it issued the third

certificate, the Board began work on the last phase. It had received a letter dated February 8, 1993 from Andrew Raven, who asked the Board to intervene because it "has become apparent that, these efforts notwithstanding, a settlement between the parties is not possible."

Pursuant to section 16 of its Regulations, the Board issued an order dated February 18, 1993 requiring the parties to provide useful and relevant information.

On March 22, 1993, the Public Service Alliance of Canada (PSAC) submitted to the Board a list of functions or positions sought for inclusion in the so-called "administrative" unit. According to CPC, the purpose of this list was to include some 3800 new positions in the existing unit represented by PSAC.

On April 15, 1993, the Board, on learning of the status of the discussions, summoned the parties to a meeting at the Board's offices in Ottawa. These discussions, primarily involving CPC, APOC and PSAC, concerned some 200 sales representatives to which the parties involved objected. The Board also convened a meeting of counsel for the parties which took place on May 31, 1993.

Finally, on June 3, 1993, the Board again heard counsel for the parties who filed oral and written submissions that in fact referred to a suggested process for resolving the outstanding issues concerning the "administrative" (white-collar) unit.

After carefully considering and studying these submissions, on June 17, 1993 the Board issued Letter-decision no. 1175, which reads as follows:

"Pursuant to Section 20(1) and 16(k) of the Canada Labour Code, the panel of this Board rules as follows:

(1) The Board appoints Mr. Gordon MacIssac, Senior Labour Relations Officer, Atlantic Region, Queen Square, 6th Floor, Suite 600, 45 Alderney Dr., Dartmouth, Nova Scotia, B2Y 2N6, (tel: (902) 426-7068), to meet, without delay, with counsel and representatives of the parties;

(2) Mr. MacIssac's mandate shall be to investigate whether persons claimed by the PSAC for inclusion in the white collar bargaining unit are employees within the meaning of the Code and if so whether they are appropriate for inclusion in said unit;

(3) Mr. MacIssac has the following powers:

(a) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce such documents and things as the Labour Relations Officer deems requisite to the full investigation and consideration of any matter within its jurisdiction that is before the Board in the proceeding;

(b) to administer oaths and solemn affirmations;

(c) to receive and accept such evidence and information on oath, affidavit or otherwise as the Senior Labour Relations Officer in his discretion sees fit whether admissible in a court of law or not;

(d) to inquire and investigate into the duties, responsibilities or other evidence relevant to the positions / incumbents sought for inclusion by PSAC in the administrative / technical / professional bargaining unit hereinafter defined as the white collar bargaining unit;

(4) The evidence presented by the parties will be recorded electronically;

(5) CLRB offices shall be utilized when possible. Other locations shall be fixed by the Labour Relations Officer as he sees fit and appropriate;

(6) Mr. MacIssac shall proceed immediately and on a continuous basis with this investigation and will proceed first with the York Division Finance Group;

#### The Investigating Officer's Report

The Senior Labour Relations Officer shall prepare and file a report of his findings with the panel of this Board as soon as his investigation with regard to the York Division Finance Group is complete, with copies to the parties.

This report shall include the Senior Labour Relations Officer's summary of relevant facts, as well as the positions of the parties on any positions left in dispute.

The parties shall have fifteen (15) days from receipt of the Officer's report to make written submissions. Those submissions shall be filed with the panel of this Board with copies to the other parties who will have ten (10) days to

reply.

The Board advises the parties that the panel of this Board shall rule on the status of employees and on the inclusion or exclusion of positions or allocations in the white-collar bargaining unit referred to in the Officer's report.

Those rulings and allocations shall constitute guidelines and serve as a pilot for possible identical/similar functions and positions in other divisions within the Corporation.

The present panel of this Board reserves its jurisdiction to dispose of the remaining issues between the parties in the manner it deems appropriate and in conformity with the provisions of the Canada Labour Code."

Mr. MacIssac set to work immediately and convened a first meeting of the parties' representatives in Ottawa on June 23, 1993.

A few days later, on July 7, 1993, the Board, following normal procedures, and after giving Mr. MacIssac instructions to this effect, posted a "Notice to Employees" of the York Division Finance Group. This notice included a list of 43 positions to be investigated.

It should also be noted that, on June 18, 1993, the Board, after carefully considering the parties' written submissions requested in a letter dated September 25, 1991, issued an interim certification order (bearing file number 530-2203) in the name of PSAC, the purpose of this order being to merge the 15 bargaining units already represented by PSAC (white-collar units) into a single unit, without prejudice to the Board's right to amend this order upon resolution of the present dispute.

Then, Mr. MacIssac held several meetings with the parties' representatives. He increased the contacts and discussions and spared no effort to fulfil his mandate. Via the mediation process, he urged the parties to consult with one another in order to try and reach a comprehensive and amicable settlement of the dispute.

On November 19 1993, the Board received from the parties a signed memorandum of agreement. This agreement settled, once and for all, all outstanding questions concerning the configuration of the white-collar bargaining unit. It covered not only the York Division Finance Group, but also all other Divisions.

The Board officially takes note of this comprehensive agreement reached by the parties.

As the Board repeatedly stated in past decisions and emphasized in particular in Canada Post Corporation (993), supra:

*"Past Board decisions are clear and definite in this type of case: the Board in no way considers itself bound by an agreement entered into by the parties concerning the configuration and content of a so-called appropriate unit."*

(page 14,162)

On the other hand, the Board consistently encouraged the parties to sit down at the same table and try to reach an agreement.

Although the Board is in no way bound by any memorandum of agreement entered into by the parties, "it cannot flatly dismiss and ignore the parties' remarkable and commendable efforts to reconcile their differences and thus dismiss this initiative out of hand" (Canada Post Corporation (993), supra, page 14,165).

This is especially true because this agreement was reached under the guidance of one of the Board's most competent and dedicated labour relations officers, Gordon MacIssac, appointed as special investigating officer by this Board panel on June 17, 1993.

The Board must merely be satisfied that the unit to be

determined constitutes an appropriate unit within the meaning of the Code. And it has stated that it "will not always be possible to determine the most appropriate unit" (National Bank of Canada (1985), 58 di 94; 11 CLRBR (NS) 257; and 86 CLLC 16,032 (partial report) (CLRB no. 542), pages 138; 299-300; and 16,312; emphasis added).

In the present case, the Board wants to state that the certification order it is issuing, in this particular case, is exceptional. The wording of this order reflects, in fact, the legal impact of voluntary recognition agreed to by the parties and gives effect to this agreement, and that is all it does.

The Board, exercising its exclusive jurisdiction, is satisfied, after carefully considering the matter, that this is in fact an appropriate unit within the meaning of the Code.

This order does not necessarily rely on the recognized criterion or test of the "intended scope of a certification." It in no way constitutes a precedent and is not to be viewed by anyone as a certification order to which the parties will refer in future and which can serve as a legal or quasi-legal precedent before the Board. The parties will be governed by this agreement knowing that it is the product of their own labour, without prejudice and for all legal purposes. They alone assume full and complete responsibility for it.

The Board is making this order after receiving assurances that the parties concerned will withdraw all proceedings they have instituted through review applications under section 18 of the Canada Labour Code or under section 28 of the Federal Court Act.

The Board considers these reasons for decision, together with the accompanying order to have settled definitively all issues outstanding between the parties.

The Board wishes to thank counsel and the parties' representatives for the co-operation and patience they have shown throughout this lengthy proceeding.

The Board has been guided in this matter solely by a fundamental objective of the Canada Labour Code, namely, to foster the development of "good relations and constructive collective bargaining practices [which Parliament] deems to be in the best interests of Canada in ensuring a just share of the fruits of progress to all" (Part I — Preamble to the Canada Labour Code).

This is a unanimous decision of the Board.

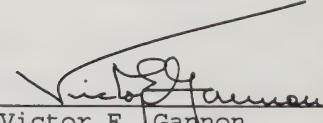


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M. Brian Keller  
Vice-Chairman  
(pursuant to section 11 of  
the Code)



Jacques Archambault  
Member



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Victor E. Gannon  
Member

ISSUED at Ottawa this 19<sup>th</sup> day of November 1993.

# information

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## Summary

BRUCE STEWNER, COMPLAINANT,  
AND OAK POINT SERVICE,  
RESPONDENT.

Board File: 950-254

Decision No.: 1040

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## Résumé de Décision

BRUCE STEWNER, PLAIGNANT, ET  
OAK POINT SERVICE, INTIMÉE.

Dossier du Conseil: 950-254

Décision n°: 1040

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The complainant alleges that he was dismissed from his employment with the respondent employer, Oak Point Service, contrary to section 147(a) of the Canada Labour Code (Part II - Occupational Health and Safety).

At the commencement of the hearing, the Employer challenged the Board's jurisdiction to hear the complaint on the basis that Oak Point was a provincial undertaking and therefore not subject to the provisions of the Canada Labour Code.

After a review of the facts and the relevant jurisprudence, the Board determined that the Employer's preliminary objection was well-founded and that the labour relations of the Respondent Employer fell under provincial jurisdiction.

Le plaignant allègue qu'il a été congédié par l'employeur intimé, Oak Point Service, en violation de l'alinéa 147a) du Code canadien du travail (Partie II - Sécurité et santé au travail).

Au début de l'audience, l'employeur a contesté la compétence du Conseil d'instruire la plainte parce qu'il prétend qu'il exploite une entreprise provinciale et n'est donc pas assujetti au Code canadien du travail.

Après avoir passé en revue les faits de l'affaire et la jurisprudence pertinente, le Conseil a jugé que l'objection préliminaire de l'employeur était bien fondée et que les relations du travail de l'employeur intimé relevaient de la compétence provinciale.



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Relations  
Board

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Conseil  
Canadien des  
Relations du  
Travail

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Reasons for decision

Bruce Stewner,  
complainant,  
and  
Oak Point Service,  
respondent.

Board File: 950-254

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The Board: Mr. Richard I. Hornung, Q.C., Chairman, and  
Messrs. Calvin B. Davis and Patrick H. Shafer, Members.

Appearances

Mr. Bruce Stewner, on his own behalf; and  
Mr. Allan F. Foran, for the respondent.

Reasons for decision: Richard I. Hornung, Q.C.,  
Chairman.

I

The Complainant, Mr. Bruce Stewner, alleges, pursuant  
to section 133 of the Canada Labour Code (Part II -  
Occupational Health and Safety), that he was dismissed  
from his employment with the Respondent Employer, Oak  
Point Service (Oak Point), contrary to section 147(a)  
of the Code.

At the commencement of the hearing, the Employer  
challenged the Board's jurisdiction to hear the  
complaint on the basis that Oak Point Service was a  
provincial undertaking and therefore not subject to the  
provisions of the Canada Labour Code.

Pursuant to a joint request from the parties, the Board agreed to hear and determine the Employer's jurisdictional challenge prior to dealing with the merits of the application.

II

The facts are not in dispute.

Oak Point Service was founded in 1970 as a partnership between Paul's Hauling Ltd., Gardewine North, and Westcan Bulk Transport Ltd. (the "Partner" Companies), each of which were at the time, and continue to be, involved in interprovincial trucking operations, and each of which are undeniably federal undertakings. Oak Point was established as an "A-Z" repair and maintenance facility to service heavy-duty tractors and trailers owned by the three partner companies. In addition, according to John Albrechtsen, it was contemplated that Oak Point would supply maintenance and repair service to other non-affiliated companies.

The General Manager of Oak Point, since its inception, has been John Albrechtsen. Albrechtsen worked for Paul's Hauling until Oak Point was formed and is the brother of Paul Albrechtsen who owns Paul's Hauling, Westcan Bulk and Gardewine North. John Albrechtsen, however, does not hold an interest in any of the partner companies.

According to John Albrechtsen: Oak Point operates completely independently of its three founding partners; all management decisions are made without consultation with any of the partners; although audited financial statements are provided to his brother

through Paul's Hauling, there is no established reporting process from Oak Point to the partner companies; and finally, all of the profits earned by Oak Point remain with him.

The land and buildings out of which Oak Point operates are owned by Paul's Hauling and are leased to Oak Point on an annual basis. In fact, all three partner companies, as well as Oak Point, operate out of premises on adjacent properties owned by Paul's Hauling in Winnipeg, Manitoba.

However, Oak Point owns all of its tools, pays all of its employees directly, and, through John Albrechtsen, maintains unimpeded control of its own operation. It actively pursues clients outside of its three founding partners and in fact earns in excess of 50% of its income from that independent source.

Although the majority of Paul's Hauling repair and maintenance work is done by Oak Point, Paul's Hauling also has a repair and maintenance shop in Brandon, Manitoba, at which its equipment is repaired.

Gardewine North has its own repair facility situated next door to Oak Point. Oak Point nevertheless does approximately 32% of Gardewine's total repair and maintenance work.

Finally, although Westcan Bulk has its base of operation in Alberta, and the majority of its equipment is repaired there, we infer from the evidence adduced that the minimal repair work required by Westcan Bulk in Manitoba is done by Oak Point.

The evidence of Karen Gifford, Oak Point's comptroller, disclosed that Oak Point records show that of its gross income the following is earned from its partner companies:

1.	Paul's Hauling	38.20%
2.	Gardewine North	9.74%
3.	Westcan	0.45%
<hr/>		
48.39%		

The balance of Oak Point's income is derived from repair, maintenance, and wash-rack services it performs for outside unrelated customers.

### III

For the employees of Oak Point to fall within the jurisdiction of this Board, they must be found to be employed upon or in connection with a federal work, undertaking or business as contemplated by section 4 of the Code, which provides:

*"4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers."*

The definition of "federal work, undertaking or business" is found in section 2 of the Code, the relevant portions of which read as follows:

*"2. In this Act,*

*'federal work, undertaking or business' means any work, undertaking or business that is*

within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

...

(h) a work or undertaking that, although wholly situated within a province, is before or after its execution declared by Parliament to be for the general advantage of Canada or for the advantage of two or more of the provinces, ..."

The regulation of labour relations is a subject which falls within the "Property and Civil Rights" aspect of provincial jurisdiction unless it is shown that it forms an integral part of federal primary jurisdiction over a federal subject under the Constitution Act, 1867. An undertaking falls under federal jurisdiction in two cases: it may be in itself a federal undertaking and/or it may be an integral part of a core federal undertaking.

Oak Point is clearly not a federal undertaking in itself. Its activities, of tractor-trailer repair and maintenance, are *per se* provincial in nature.

The Board must therefore consider the second possibility to determine if Oak Point can be characterized as an integral part of a federal undertaking to do so.

"...the first step is to determine whether a core federal undertaking is present and the extent of that core undertaking. Once that is settled, it is necessary to look at the particular subsidiary operation, ... to look at the 'normal or habitual activities' of that department as 'a going concern', and the practical and functional relationship of those activities to the core federal undertaking."

(Northern Telecom Limited v. Communications Workers of Canada et al., [1980] 1 S.C.R. 115; (1979), 98 D.L.R. (3d) 1; and 79 CLLC 14,211 (Northern Telecom no. 1) pages 133; 14; and 143)

This second possibility can only be considered if there exists a core federal undertaking in relation to which Oak Point might be seen as an integral part. The three partner companies who own Oak Point are involved in interprovincial trucking operations and are therefore federal undertakings. Consequently, there exists a core federal undertaking, particularly in the form of Paul's Hauling, in relation to which Oak Point might be considered as integral.

The applicable test to determine whether a particular subsidiary operation to a core federal undertaking falls within federal jurisdiction was set out in Northern Telecom no 1, supra:

*"On the basis of the foregoing broad principles of constitutional adjudication, it is clear that certain kinds of 'constitutional facts', facts that focus upon the constitutional issues in question, are required. Put broadly, among these are:*

- (1) *the general nature of Telecom's operation as a going concern and, in particular, the role of the installation department within that operation;*
- (2) *the nature of the corporate relationship between Telecom and the companies that it serves, notably Bell Canada;*
- (3) *the importance of the work done by the installation department of Telecom for Bell Canada as compared with other customers;*
- (4) *the physical and operational connection between the installation department of Telecom and the core federal undertaking within the telephone system and, in particular, the extent of the involvement of the installation department in the operation and institution of the federal undertaking as an operating system."*

*(pages 135; 15-16; and 144)*

These criteria were confirmed by the Supreme Court of Canada in United Transportation Union v. Central

Western Railway Corporation, [1990] 3 S.C.R. 1112; (1990), 76 D.L.R. (4th) 1; and 91 CLLC 14,006. In re-examining the concept of operational integration, Chief Justice Dickson specified the appropriate test in terms of **dependency** of the federal undertaking upon the subsidiary operation. Summarizing the case law, His Lordship stated:

"Both the Stevedores' Reference and Letter Carriers' cases indicate that **dependence** of a core federal work or undertaking upon a group of workers tends to support federal jurisdiction over those workers. In subsequent judgments of this Court, this jurisdictional test has been elaborated upon. Prime among these more recent decisions is Northern Telecom Ltd. v. Communications Workers of Canada, [1980] 1 S.C.R. 115 (Northern Telecom No.1), where this Court considered the proper interpretation and application of ss. 2 and 4 of the Canada Labour Code. . . ."

(pages 1138; 17-18; and 12,053-12,054; emphasis added)

In that case, the Court found determinant the absence of dependency and concluded that Central Western Railway was not integral to the operation of CN:

"Finally, and perhaps most importantly, it cannot be said that CN is in any way dependent on the services of the appellant. Since 1963, CN has consistently wanted to abandon the Central Western rail line, indicating that the line is not vital or essential to its operations. Consequently, in contrast to the Northern Telecom cases, the core federal undertaking (CN) would not be severely disadvantaged if the appellant's employees failed to perform their usual tasks. In sharp contrast to the Stevedores' Reference or Letter Carriers' case, the effective performance of CN's obligation as a national railway is not contingent upon the services of the appellant. These factors point strongly, almost decisively, against a finding of federal jurisdiction over the employees in question."

(pages 1142; 20-21; and 12,055; emphasis added)

IV

Turning now to the application of the Northern Telecom test.

(1) The Board must first look at the general nature of Oak Point's operations as a "going concern" and, in particular, the role of its repair and maintenance work within the operation of the three partner companies.

Oak Point is engaged in the business of general repair and maintenance of heavy-duty tractor-trailers. It also provides wash-rack services for the cleaning of tractor-trailers and tank units. These activities are, without a doubt, important to the operation of a trucking company. However, the role of the subsidiary undertaking in this case is diminished by the fact that all three companies have their own repair and maintenance departments: Paul's Hauling in Brandon, Manitoba; Gardewine North in Winnipeg (next door to Oak Point); and Westcan Bulk in Alberta.

(2) The second set of "constitutional facts" on which the Board must focus pertain to the corporate relationship between Oak Point and the companies it serves. Although Oak Point was established as a partnership by the three federally regulated trucking companies, corporate relationships are nonetheless not, *per se*, determinative in deciding constitutional issues; (Northern Telecom Canada Limited et al. v. Communications Workers of Canada et al., [1983] 1 S.C.R. 733; (1983), 147 D.L.R. (3d) 1; and 83 CLLC

14,048 (Northern Telecom no.2); Central Western Railway Corporation (1987), 68 di 177 (CLRB no. 611); and United Transportation Union v. Central Western Railway Corp., supra). Although the evidence disclosed that Oak Point, as a corporate entity, was created by the partnership of the three federal undertakings, it nevertheless also established that, from a corporate management perspective, Oak Point operates entirely independent of any of the founding partners. Consequently, the corporate relationship does not preclude a finding that Oak Point falls under provincial jurisdiction.

(3) The third element of the test refers to the importance of the work done by Oak Point for the core federal undertakings as compared with other customers. In Bernshire Mobile Maintenance Ltd. v. Canada Labour Relations Board, [1986] 1 F.C. 422; (1985), 22 D.L.R. (4th) 748; and 85 CLLC 14,060, Justice Uriel made the following comment with respect to this criterion:

*"The necessity for this inquiry arises from the constitutional principle that federal jurisdiction over labour relations will not be founded on exceptional or casual factors.  
..."*

(pages 433; 757; and 12,323).

As indicated earlier, 48.39% of Oak Point's gross income is earned from work done for the partner companies. Nothing in the evidence indicates that these percentages of Oak Point's activities are of exceptional or casual nature except for the work performed on an irregular basis for Westcan Bulk's vehicles.

The breakdown of the 48.39% provided earlier demonstrates that Paul's Hauling, with 38.20%, has the most predominant relationship with Oak Point while the other two companies are more peripheral. It is nevertheless clear that more than 50% of Oak Point's revenue is garnered from sources outside of the founding partner companies.

In many cases of this nature, the percentage of the subsidiary's revenues coming from the core federal undertaking was very high. For example, in Northern Telecom no. 2, supra, 80% of the Northern Telecom installers work was done for Bell Canada. The Supreme Court held that Northern Telecom's involvement with Bell was a predominant part of the installers' work. In Bernshine Mobile Maintenance Ltd., supra, the importance of the work done for the core federal undertaking was evident since the totality of Bernshine's maintenance work was done for Reimer, its only customer. In Highway Truck Service Ltd. v. Canada Labour Relations Board (1985), 62 N.R. 218 (F.C.A.), 70% of Highway's revenues coming from work on Reimer's equipment was held to be a "profit-centre".

In the present case, although the net income that is partner derived is substantial in our view, considering all the material circumstances, it is not significant enough to be determinative of the constitutional issue.

(4) The final criterion for the Board to consider is: the physical and operational connection between Oak Point and the three partner companies and, "...in particular, the extent of the involvement of (Oak Point) in the operation and institution of (the partner

companies) as an operating system". In the instant case, this is the most important factor:

*"This factor is obviously the most critical in determining whether the federal Parliament or the provincial legislature has constitutional jurisdiction. There is clearly some connection between the Telecom installers and Bell Canada, the core federal undertaking, but is it sufficient to displace the prima facie position that labour relations are a matter of provincial competence?"*

(Northern Telecom no. 2, supra, pages 772; 5; and 12,260)

In answering this query the Board must determine if Oak Point's activities are "vital", "essential" or "integral" to the continued operation of the Paul's Hauling, Westcan Bulk, and Gardewine North. In order to make this determination, the Board must decide if Oak Point's activities are so connected to those of its three partner companies as to make them **dependent** upon the continued operation of Oak Point in a manner as envisaged by the statement made by the Supreme Court of Canada in Central Western Railway, supra, with respect to the integration of Central Western Railway to the operation of the grain elevators located along the rail line:

*"In my view, this issue can be dealt with summarily. As the intervener the Attorney General for Alberta argued, the elevators are not dependent upon the continued operation of Central Western. . ."*

(pages 1143; 21; and 12,055; emphasis added)

On many occasions, this Board has held that service and maintenance of a core federal undertaking engaged in trucking is an integral part of that undertaking and falls under federal jurisdiction: see Bernshire Mobile Maintenance Ltd., supra; Highway Truck Service Ltd.,

supra; and Wilton Ford Truck Sales (1982) Limited (1987), 69 di 161 (CLRB no. 625). (For similar cases in the field of aviation maintenance, see North Canada Air Limited v. Canada Labour Relations Board, [1981] 2 F.C. 399; (1980), 117 D.L.R. (3d) 206; and 81 CLLC 14,072; Re Field Aviation Co. Ltd. and International Association of Machinists and Aerospace Workers Local Lodge 1579 (1974), 45 D.L.R. 751 (Alta. S.C.); Butler Aviation v. International Association of Machinists, [1975] F.C. 590; and (1975), 76 CLLC 14,008; and Innotech Aviation Limited (1993), as yet unreported CLRB decision no. 1018).

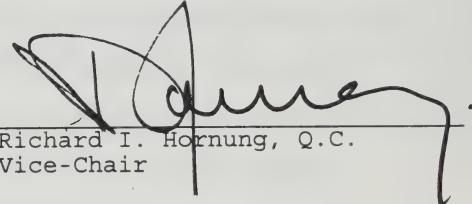
However, in all those cases, the core federal undertakings were actually dependent upon the continued operation of the subsidiary undertaking. In Bernshine Mobile Maintenance Ltd., Reimer had ceased doing its own tire maintenance and vehicle washing when it contracted out that work to Bernshine. Maintenance operations were acknowledged by the parties to be "critical" to the operations of Reimer and the latter was Bernshine's only customer. Moreover, Bernshine operated on Reimer's premises and used the latter's equipment. In Highway Truck Service Ltd., Reimer had ceased doing its own mechanical maintenance from the moment it contracted out that work to Highway and, as was the case in Bernshine, maintenance operations were recognized by the parties to be "critical" to the continued successful operations of Reimer. In addition, as mentioned above, the percentage of Highway's revenues from Reimer's activities was in that case 70%. The Wilton Ford Truck Sales (1982) Limited case deals with the same situation as in Highway since Wilton only replaced Highway as the subcontractor for the mechanical work done on Reimer's equipment.

The present case is distinguishable by reason of the fact that the three partner companies each have their own repair and maintenance departments. The Westcan Bulk situation is clear: the occasional nature of the work done by Oak Point on Westcan Bulk's equipment demonstrates that Westcan does not depend upon the continued operation of Oak Point. For its part, Gardewine North has recourse to Oak Point services only thirty two percent of the time. In the case of Paul's Hauling, the dependency is neither evident since 48% of its repair and maintenance work is done in its own repair shop or elsewhere. The statistical evidence supports John Albrechtsen's testimony that his company could clearly survive without Paul's Hauling and that, more importantly, Paul's Hauling could easily replace the services provided by Oak Point either in its own shops or through competing repair businesses which operate in close proximity in Winnipeg.

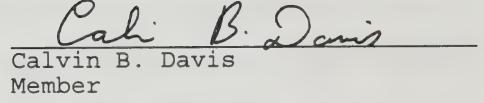
Although there is clearly a connection between Oak Point and the core federal undertakings, particularly Paul's Hauling, we are nevertheless of the view that this connection lacks the requisite "vital", "essential" and "integral" elements; and, in the words of the Supreme Court of Canada in Central Western Railway, supra, that the three companies "...would not be severely disadvantaged..." if Oak Point ceased to perform its usual functions on their behalf.

not sufficient to supersede the *prima facie* principle that its labour relations fall under provincial jurisdiction.

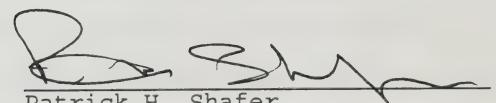
The application is dismissed.



Richard I. Hornung, Q.C.  
Vice-Chair



Calvin B. Davis  
Member



Patrick H. Shafer  
Member

DATED at Ottawa this 29th day of November, 1993.

CLRB/CCRT - 1040

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## Summary

Council of Railway Unions: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada; International Brotherhood of Electrical Workers; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Association of Machinists and Aerospace Workers; and Sheet Metal Workers' International Association, complainants, and Canadian National Railway Company, respondent.

## Résumé

Conseil des syndicats ferroviaires: Association unie des compagnons et apprentis de l'industrie de la plomberie et de la tuyauterie des États-Unis et du Canada; Fraternité internationale des ouvriers en électricité; Fraternité internationale des chaudronniers, constructeurs de navires en fer, forgerons, forgeurs et aides; Association internationale des machinistes et des travailleurs de l'aérospatiale; Association internationale des travailleurs du métal en feuilles, plaignants, et Compagnie des chemins de fer nationaux du Canada, intimée.

Board File: 745-4542

Decision No.: 1041

Dossier du Conseil: 745-4542

Décision n° 1041

The complainant union filed a complaint alleging a breach by the employer of sections 50(a) and 94(1)(a) of the Canada Labour Code.

The unions allege that the employer breached section 50(a) of the Code:

- (a) by implementing only selective terms and conditions of employment rather than the complete terms of its "final offer" of settlement, as it promised to do when the offer was presented; and
- (b) by insisting on a term in the collective agreement which differed from that being offered to other employees represented by a rival union.

In addition, the unions complain that CN violated section 94(1)(a) of the Code by implementing terms and conditions of employment which they allege exceeded the benefits to employees that were offered in the employer's final offer.

Le syndicat plaignant a déposé une plainte alléguant que l'employeur avait enfreint les alinéas 50a) et 94(1)a) du Code canadien du travail.

Les syndicats allèguent que l'employeur a enfreint l'alinéa 50a) du Code:

- a) en ne mettant en oeuvre que certaines conditions d'emploi plutôt que l'ensemble des modalités de la dernière offre, comme il avait promis de le faire au moment de présenter l'offre; et
- b) en insistant sur une modalité de la convention collective qui diffère d'une condition offerte aux employés représentés par un syndicat rival.

En outre, les syndicats se plaignent que l'employeur a enfreint l'alinéa 94(1)a) du Code en mettant en oeuvre des conditions d'emploi qui, prétendent-ils, sont supérieures aux conditions offertes aux employés dans la dernière offre de l'employeur.

The Board dismissed the complainant unions' complaints.

Evidence revealed that the employer made it clear when its final offer was presented that the offer was perishable and could be revoked if not accepted. When the union membership voted overwhelmingly to defeat the proposal, the employer implemented selective terms and conditions which it was entitled to do having regard to the fact that the conditions in section 89(1)(a) to (d) were met.

In addressing the issue of whether a breach of section 50(a) had occurred, the Board looked at the total bargaining picture and the entire relationship of the parties. It concluded that CN was engaging in hard bargaining which did not subvert the bargaining process or undermine the union bargaining committee's efforts.

Le Conseil a rejeté les plaintes des syndicats plaignants.

D'après la preuve, l'employeur a précisé lorsqu'il a présenté sa dernière offre que cette offre n'était pas permanente et pouvait être révoquée si elle n'était pas acceptée. Lorsque les membres des syndicats ont voté en masse pour rejeter l'offre, l'employeur a mis en oeuvre certaines conditions d'emploi, ce qu'il avait le droit de faire puisqu'il avait rempli les conditions prévues aux alinéas 89(1)a à d).

En abordant la question de savoir s'il y avait eu violation de l'alinéa 50a), le Conseil a examiné les négociations prises dans leur ensemble ainsi que les rapports entre les parties. Il a conclu que l'employeur participait à des négociations serrées, ce qui ne portait atteinte ni au processus de négociation ni aux efforts du comité de négociation du syndicat.

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Canada  
Labour  
Relations  
Board

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Conseil  
Canadien des  
Relations du  
Travail

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Reasons for decision

Council of Railway Unions:

United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada;  
International Brotherhood of Electrical Workers;  
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers;  
International Association of Machinists and Aerospace Workers;  
and  
Sheet Metal Workers' International Association,

*complainants,*

and

Canadian National Railway Company,

*respondent.*

Board File: 745-4542

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The Board: Mr. Richard I. Hornung, Q.C., Chairman, and Messrs. Calvin B. Davis and François Bastien, Members.

Reasons: Richard I. Hornung, Q.C., Chairman.

Appearances:

Messrs. Michael Church, Jim Nyman, and Abe Rosner for the complainants; and

Messrs. John Coleman and John Pasteris for Canadian National Railway Company.

I

The Complainants (hereafter also the "Union" or "Council") bring two applications alleging a breach, by the Employer, Canadian National Railway Company ("CN"), of section 50(a) and 94(1)(a) of the Canada Labour Code.

The initial complaints revolve around essentially two interrelated allegations:

- (1) That CN violated section 50(a) of the Canada Labour Code, when in posting terms and conditions of employment on June 8, 1993, it did not implement the final offer of settlement as it indicated it would do when that offer was presented on February 11, 1993;
- (2) That CN violated section 94(1)(a) of the Code by selectively implementing a term and condition of employment relating to lump sum severance payments made to employees who voluntarily left the company's employment.

Although the initial application generally disclosed the complaint as above, the Board, pursuant to the principles set forth in: Eastern Provincial Airways Limited v. Canada Labour Relations Board et al., [1984] 1 F.C. 732; (1983), 2 D.L.R. (4th) 597; and 50 N.R. 81; and Iberia Airlines (1990), 80 di 165; and 13 CLRBR (2d) 224 (CLRB no. 796), permitted the Council to adduce evidence detailing the conduct of negotiations from the commencement of the bargaining round to meetings held just prior to the hearing.

As a result, the Council raised a further matter which, again, is interrelated with the previous two and essentially alleges:

(3) that CN violated section 50(a) of the Code by insisting on Employment Security terms in its collective agreement proposals which differed from those offered and accepted by employees represented by the Canadian Autoworkers (CAW) in the same shopcraft unit.

II

On the 3rd day of September, 1993, the Minister provided his consent to proceed on the section 50(a) application in the following terms:

"CONSENT TO COMPLAIN"

*Pursuant to Section 97(3) of the Canada Labour Code, I consent to a complaint being made to the Canada Labour Relations Board by the Complainant against the Respondent, for an alleged failure to comply with Section 50(a) of the Canada Labour Code in that, after notice to bargain collectively was given, the Respondent failed to bargain collectively in good faith and make every reasonable effort to enter into a collective agreement.*

*Dated at Ottawa this 3rd day of September, 1993."*

III

At the conclusion of the hearing, the Board undertook to provide the parties with its decision within the week. Accordingly, toward that end, and in an effort to achieve brevity, the facts as found by the Board are recited below without reference to any conflict in the evidence, where it existed, except for one important area regarding the Employment Security provisions. Where there was conflict in the evidence the facts as

recited represent the Board's determination of the same.

The current collective agreement between the parties expired on December 1, 1991. The required notices to bargain were served and bargaining commenced in October. At the time, 6 unions represented the shopcraft employees at CN; 5 of those, that are the applicants, bargained together. The 6th union, the Canadian Auto Workers (CAW), which represents the carmen, bargained separately.

On June 2, 1992, CN and CAW reached a new collective agreement.

CN, however, did not make a comprehensive proposal for settlement of a new collective agreement to the Council until June 23, 1992. Even then, some of the terms offered to the Council were inferior to those settled upon by CAW.

However, on February 11, 1993, CN made its final proposal to the Council, the terms of which, CN asserts, were identical to those offered to the CAW. The Council, on the other hand, maintains that the offer differed in one important area, namely, that the provisions of the Employment Security Clause were given a substantially different interpretation than that provided to CAW. More will be said of this later.

When CN gave its final offer to the Council, it indicated that it intended to implement unilaterally the terms of the same if it was not accepted. CN does not dispute this. However, it is equally clear that at the time the final offer was made, CN also advised the

Council's negotiating committee that the offer was, in fact, perishable and, if not accepted, would have to be reviewed by CN in light of its deteriorating financial situation.

The Council's bargaining committee, agreed to put the offer to a vote of their membership, with a recommendation that it be rejected. They also agreed that CN could communicate directly with the employees in order to outline its position.

On March 30, 1993, the Council advised CN that the proposal was defeated by a negative vote of 89% of the voting membership.

The parties met on two occasions in April to negotiate further, however, the company stood firmly by its position that the offer proposed on February 11, 1993 was final and no improvement would be made upon it.

On May 7, 1993, CN wrote to the Council and withdrew its final offer of February 11, 1993 indicating that the terms and conditions of employment would be posted in the "near term future". By this date, all of the requirements of sections 89(1) (a)-(d) of the Code had been met, and the parties were in a position to strike or lockout, or, in the case of the Employer, to alter the terms and conditions of employment without violating section 50(b).

On June 8, 1993, the Company posted selective terms and conditions of employment rather than the entire final offer proposed on February 11, 1993. The terms posted altered the existing agreement in three significant areas:

- (a) The provisions of the collective agreement providing for the Revision of Rules were cancelled;
- (b) Access to arbitration for grievances which arose after June 8, 1993, were cancelled; and,
- (c) Most significantly, the Company instituted a severance program, at locations and times that the Company would designate, which provided for employees who were on Employment Security, to receive lump sum payments of \$50, \$55, or \$60,000.00 plus an incentive of \$15,000.00 if the offer was accepted within three months of the time the proposal was made in their location. In addition, there was also improvement on the retirement clauses which granted retiring employees a lump sum payment of up to 45 weeks of salary.

It is important to point out that the terms of item (c) above, with the exception of the underlined reference, mirror those contained in the final offer of February 11, 1993, and duplicate the similar provisions of the collective agreement concluded between CN and CAW.

According to Mr. Terry Lineker, and Mr. Mark Boyle, CN's Vice-President of Labour Relations, and Director of Labour Relations respectively, CN found it necessary to implement these selective terms and conditions rather than the entire terms offered on February 11, 1993, for essentially three reasons:

- (a) CN had just incurred the largest corporate financial loss in Canadian history for the year end 1992;
- (b) Financial reports for the first quarter of 1993 indicated a further 22-million-dollar loss with reduced revenues of 32-million dollars from the same quarter in 1992;
- (c) On March 1, 1993, the Company announced that, in order for it to be economically viable in the future, it would require a reduction of 10,000 employees from its overall payroll over a five-year period.

From the outset of negotiations, both with the Council and CAW, CN had made it clear that it would seek concessions in the Employment Security provisions which would allow it to reduce, over time, the complement of employees who were protected by those terms. The circumstances of clause (c) above only firmed its resolve.

Following June 8, 1993, sporadic bargaining continued between the parties, to no avail.

The area of dispute, which brought the collective bargaining to impasse, was the interpretation of the Employment Security provisions in the Company's proposals to the Council. Mr. Abe Rosner, Chief Negotiating Spokesman for the complainant Unions, testified that if the parties came to an agreement regarding the interpretation of the Employment Security provisions, settlement would be reached on all other outstanding issues and an agreement could be concluded.

Because it is the central issue, which both gives rise to the present complaints and separates the parties from agreement, it is necessary to examine the "Employment Security" issue more closely.

"Employment Security", as provided in the Unions' previous collective agreement, is essentially employment protection for any employee who has accumulated eight years of compensatory service with CN. It provides that an employee with those qualifications cannot be laid off as a result of technical, operational, or organizational changes. This means, in the context of the Complainants' previous collective agreement, that if the position of an employee becomes redundant, that employee must nevertheless be kept on CN's payroll until a vacancy occurs for a position in his/her own union or in a union with the same Employment Security collective bargaining conditions within the region in which that employee works.

The problem arose with the terms of a new article 7.10 which CN proposed to the Council. It reads:

*"Notwithstanding any provision in a collective agreement to the contrary, employees on Employment Security status who are utilized to perform work under a collective agreement other than their own, will be governed by the terms and conditions of the collective agreement under which they work, with the exception of wages. While filling a higher rated position, the employee shall receive the higher rate, but if required to fill a lower rated position, the employee's basic weekly rate will be maintained."*

The terms proposed mirror those accepted by CAW.

The impasse between the Complainants and CN arises over

the interpretation (or "spin" as Mr. Rosner chose to refer to it), of the said clause given by CN. Because it is fundamental to their dispute, it is necessary to provide the basis for the difference of interpretation of the clause.

Mr. Thomas Wood, the President of CAW Local 100, represented the CAW employees in negotiations with CN. As indicated, a collective agreement was reached between CAW and CN on June 2, 1992.

Mr. Wood testified that when he negotiated the Employment Security provisions in CAW's collective agreement, he was of the view that he had improved the Employment Security provisions that had existed in the previous collective agreement. Essentially, Wood understood that the clause provided for a narrowing of the geographic area to which his employees had to relocate with a concurrent broadening of the unions into which they would move. In addition, it required them to be bound by the terms of the collective agreement which governed the position they moved into. His view was that as a result of the newly negotiated agreement, although employees would be required to fill any union vacancy, including positions in the running trades, they would only have to do so in the area in which they worked and not the region.

However, when that same clause (7.10) was proposed to the Council, it was revealed as a result of questioning by Rosner, that, as CN saw it, the transfer to a job in the area of operation was only the first step in the procedure. The process, according to CN's interpretation was as follows:

- 1) Employees who were presently under Employment Security provisions of the existing collective agreement would initially have to take a transfer to any other union with a vacancy in their area;
- 2) Clause 7.10 states, inter alia, that employees who take the transfer into another union "will be governed by the terms and conditions of the collective agreement under which they work";
- 3) If they held the position for one year, they would become subject to the terms and conditions of employment of the union which they transferred into;
- 4) Therefore, if employees transferred to positions within the area, or for that matter in the region, they would only receive the benefit and protection of the collective agreement which governed the union transferred into;
- 5) If that union's collective agreement had no Employment Security provisions, or inferior security provisions, which required a transfer into districts, regions, or eventually across the country, employees would, after one year, be required to take the same or lose their employment with CN.

Although the clause was intended to reduce the burden of CN having to carry a large number of employees operating under the Employment Security provisions, it is not disputed that it represented a substantially inferior position from the existing Employment Security

provisions which the Council had in its previous collective agreement.

In his evidence, Mark Boyle, was adamant that the above interpretation, is the one that applies to the CAW agreement as negotiated by Mr. Wood. According to Boyle, the interpretation provided to the Board by Mr. Wood, as earlier set forth, is incorrect.

Specifically, he points to the fact that prior to accepting clause 7.10, CAW's negotiating team called him to a lengthy meeting at which he clarified CN's position. Subsequent to this meeting, an agreement was reached with CAW which included the clause.

Mr. Boyle was equally adamant that the position he took with CAW with respect to the interpretation of the clause was no different than the one taken with Mr. Rosner. In short, according to Boyle, the clause and the interpretation set forth above applies to CAW and is therefore identical in all respects with the one presently offered to the Council.

Rosner testified that, when the Company's intentions with respect to the purpose for the inclusion of the Employment Security clause and its interpretation became clear to him, he "... knew there was no way we could reach a collective agreement".

The interpretative "spin" put on proposed clause 7.10 was a fundamental concern to Mr. Rosner and his negotiating team insofar as the Council had approximately 300 employees then covered by Employment Security provisions. The interpretation of the clause was therefore, apparently, far more important to the Council than to CAW who only had 3 or 4 employees

subject to the provisions at the time they concluded an agreement with CN.

In addition, according to the testimony of Rosner and Lineker, the significance of the interpretation of the Employment Security clause became more pronounced because of the current labour relations reality at CN. On July 10, 1992, the Board determined, pursuant to section 18 of the Code, that an "all-inclusive" unit of employees was the appropriate unit of shopcraft employees at CN. As a result, only one bargaining representative can represent all of the employees who, until then, were represented by 6 unions.

The parties continue to await a direction from the Board with respect to both the conduct of a representational vote and a determination of which parties will be on the ballot. This process has been delayed for various reasons including a number of intervening applications. From the time of the original order to the present, 16 months have passed during which negotiations were carried on.

Both Mr. Lineker and Mr. Rosner were candid about the fact that the uncertainty as to which parties were to be on the ballot combined with the reality of the subtle campaign now going on for majority support in the unit, made bargaining between these parties nigh on impossible in the circumstances. Each is determined not to change its position on clause 7.10: the Council, because to do so would mean capitulating to an inferior Employment Security provision fraught with the consequences that would have in the impending representational campaign and vote; CN, because to do so would jeopardize what, from its perspective, is a

workable Employment Security provision, and would provide the Council with a preferred position in the representational campaign presently underway at its workplace.

IV

There is no need to reiterate the Board's jurisprudence regarding bad faith bargaining. The crux of its position is contained in CKLW Radio Broadcasting Limited (1977), 23 di 51; and 77 CLLC 16,110 (CLRB no. 101) where it stated:

*"The Board is not an instrument for resolving bargaining impasses. Proceedings before the Board are not a substitute for free collective bargaining and its concomitant aspect of economic struggle. Therefore, the Board should not judge the reasonableness of bargaining positions, unless they are clearly illegal, contrary to public policy, or an indicia, among others, of bad faith. Because collective bargaining is a give and take determined by threatened or exercised power, the Board must be careful not to interfere in the balance of power and not to restrict the exercise of power by the imposition of rules designed to require the parties to act gentlemanly or in a genteel fashion. At the same time, the Board must ensure that one party does not seek to undermine the other's right to engage in bargaining or act in a manner that prevents full, informed and rational discussion of the issues."*

(pages 59; and 16,784)

The essential thesis of CKLW Radio is reflected in the Board's subsequent decisions in Brewster Transport Company Limited (1986), 66 di 1; 13 CLRBR (NS) 339; and 86 CLLC 16,040 (CLRB no. 574); Eastern Provincial Airways Limited (1983), 54 di 172; 5 CLRBR (NS) 368; and 84 CLLC 16,012 (CLRB no. 448); and most recently, in an exhaustive manner, in Iberia Airlines, supra.

There is a distinction between bad faith bargaining and hard bargaining. The Board will be vigilant to ensure that it does not enter into the collective bargaining arena by either judging the reasonableness of bargaining positions or imposing a decision on the parties in circumstances where each of them are merely engaging in hard bargaining.

*"Collective bargaining is seldom easy or philanthropic. And that is no crime. One party, either the union or management, may possess particular economic power at a particular time and may exercise it to the fullest extent possible. So long as this is done within a bargaining context where the ultimate intention is still to achieve a collective agreement and go on living with the other party - albeit with an agreement that is perhaps more favourable at that time to the interests of the more powerful party - it cannot be said that the bargaining has been carried out in bad faith. Simply because a particular round of bargaining is not concluded without the threat or the actuality of strike or lockout action does not mean per se that bad faith is present. Nor does the fact that a particular round of bargaining may produce a relative winner and a relative loser in the resulting collective agreement.*

*The fact that either party takes a determined or adamant line on issues and engages in very hard bargaining does not of itself signal a violation of the law, so long as one party does not apparently intend by so doing to destroy the other. Destruction of the other may, however, be an unintended by-product of very tough bargaining and the full exercise of the bargaining power possessed by one party at that time. The other party is expected to be wise and wary enough to see such a possibility and to be prepared to make the necessary compromise so that utter defeat is avoided. . . ."*

*(Canadian Commercial Corporation (1988), 74 di 175 (CLRB no. 702) at page 186; emphasis added)*

In assessing whether the parties are engaged in hard bargaining or bad faith bargaining, the Board must look to, and appreciate, the total collective bargaining picture and the entire relationship of the parties

involved. (See Huron Broadcasting Limited (1982), 49 di 68; [1982] 2 Can LRBR 227; and 82 CLLC 16,167 (CLRB no. 378); Royal Bank of Canada (1980), 41 di 199; and [1982] 1 Can LRBR 16 (CLRB no. 267)).

The parties here have a long-standing relationship and are sophisticated collective bargainers. The candid admissions of Messrs. Lineker and Rosner makes it apparent that each side is acutely aware of the subtle nuances which are at play in the bargaining environment. In light of their relationship, and in light of the "total collective bargaining picture", we are of the view that, because of the relative circumstances affecting each of them, they were engaged in hard bargaining and nothing more.

In the circumstances, therefore, it simply cannot be said that CN's position, with respect to the Employment Security provisions, was taken with the intention to either subvert the Council or its bargaining committee in a manner that violates the Code.

V

Although CN took an entrenched position with respect to its interpretation of the Employment Security Clause, it did so not only to achieve its own bargaining self-interest, but also in an effort to maintain what it insists is the same position that had been advanced and accepted in the collective bargaining process by CAW.

VI

There is, as well, no substance to the Council's allegation that CN's failure to implement the full

final offer constituted bad faith bargaining. Although the Employer clearly told the Union negotiating committee that it intended to do so, it also made it clear that the offer was perishable and that if the Council refused it they did so at their peril. Just as a strike can be lost or won, a negotiation tactic, such as calling a vote on an offer not recommended by the negotiating committee, can be self-defeating. Having told the Council that the offer was perishable when it was presented, and having made it clear that there were good reasons which required a change in the terms implemented from those proposed in the original offer, there was clearly no obligation, in the present circumstances, for the Employer to implement the February 11, 1993 offer. Although the Employer did not assist matters by circulating information, at the Union's invitation, which indicated that it would implement the offer if the vote failed, that conduct in itself considering all the circumstances, does not amount to bad faith bargaining.

Simply put, there was nothing in the conduct of the Employer upon which the Board could conclude that the implementation of the terms and conditions were done in an attempt to subvert the bargaining process or undermine the Union bargaining committee's efforts.

VII

Finally, in the circumstances, the implementation of the buy-out provisions for those employees who applied for it does not amount to a breach of section 94(1)(a). Even if the buy-out provisions implemented on June 8, 1993 exceeded the Council's understanding of what was available in the Employer's final offer of February 11,

1993, CN nevertheless explained the rationale for the same on two fronts:

- (1) As indicated earlier, CN needed to reduce the number of employees who operated under the Employment Security provisions of the collective agreement in light of the economic realities and the targeted five-year period;
- (2) The offer, although it provided enhanced monetary payments to employees covered by Employment Security provisions, was identical to that implemented for employees who were operating under the CAW agreement.

The crux of the Council's section 94(1)(a) complaint is that CN both implemented the buy-out provisions per se and communicated with, and provided application forms directly to, employees. In his testimony, Mr. Rosner admitted that although the buy-out provisions implemented by CN were made directly to employees, they were nevertheless identical to the buy-out terms in the CAW agreement and were applied to employees in a fair and consistent manner.

Although the Council does not necessarily agree with CN's rationale for selectively implementing this provision, there is no suggestion that the motivation was other than that provided by CN's witnesses in evidence.

In his book Reconcilable Differences, (1980), Carswell, Paul Weiler explains why the employer should have the

right to alter unilaterally the conditions of employment during the period between agreements.

"The freedom to agree logically entails the right to disagree, to fail to reach an acceptable compromise. Most of the time good faith negotiations does produce a settlement at the bargaining table, often without a great deal of trouble. But often it does not ... And at that point the collective bargaining system diverges sharply from other components in the market economy....

The tacit premise underlying the system is that both employment status and collective bargaining relationship will persist indefinitely through one series of negotiations after another. And it is precisely for that reason that the means of resolving deadlocks in negotiations between union and management becomes a serious social issue.

At the same time we must appreciate the very different perspectives of the employer and the union on that subject. The employer typically has no direct and immediate interest in successfully getting the new contract settlement. That settlement almost invariably will provide for compensation increases, often in sizeable amounts. All other things being equal, the employer would just as soon stick with the status quo.... It is the union which ordinarily must take the initiative to move negotiations off dead centre. True, that is not always the case. Sometimes the status quo may be distasteful to the employer.... Suppose the employer cannot get an agreement from the union to change these requirements in a new contract. In that event, management is entitled to act unilaterally. It can simply post an announcement to its employees that it is reducing the price it will pay for labour and the amount of labour that it is going to use. That is what it means for management to exercise the rights of property and of capital; to be able to propose the terms upon which it will purchase labour for its operations.

What rights and resources do the employees and their unions have in response? In essence, they have only the collective right to refuse to work on those terms, to withdraw their labour rather than to accept their employer's offer. That is what a strike consists of.... The legal right to strike is justified not on account of its intrinsic value, but because of its instrumental role in our larger industrial relations system ...."

That the employer is entitled, in appropriate circumstances, to alter the terms and conditions of employment is undisputed. (See Air Canada (National) (1988), 72 di 169; and 88 CLLC 16,010 (CLRB no. 669) at pages 179-185); Dairy Producers Cooperative Limited and Saskatchewan Joint Board, RWDSU, [1990] 11 CLRBR (2d) 45; and Paccar of Canada Ltd. and CAIMAW (1989), 89 CLLC 14,050).

The requirements of section 89(1)(a) to (d) of the Canada Labour Code having been met, the Employer was entitled to implement new terms and conditions of employment provided that, in doing so, it did not breach section 50(a) or 97(1)(a) of the Code.

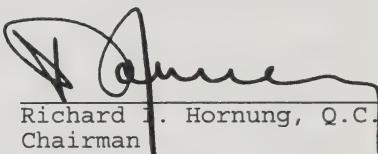
There was nothing in evidence to support the contention that the implementation of the buy-out provisions were designed to, or had the effect, of subverting the bargaining process or otherwise undermining the efforts of the Union's Bargaining Committee.

Bargaining had clearly reached an impasse, which both sides recognized. The employer therefore determined to press on with its operation as dictated by its perceived economic realities. In the circumstances, the Employer cannot now be said either to have bargained in bad faith or to have breached section 94(1)(a) as a result of the implementation of the buy-out provisions for those employees on Employment Security.

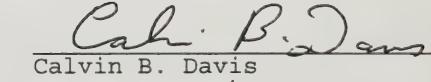
VIII

It is apparent to the Board that the impending representational vote has had a considerable impact on the negotiations between the parties. Each of them has negotiated not only in their own enlightened self interest, with an eye toward reaching a collective agreement, but also with one eye turned toward the impending representational vote. What has resulted, from both sides, is a hard bargaining impasse which does not amount to bad faith bargaining, contrary to section 50(a); nor, for that matter, does the implementation of the actual terms and conditions imposed amount, in the circumstances, to a breach of section 94(1)(a).

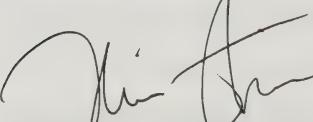
The application is dismissed.



Richard I. Hornung, Q.C.  
Chairman



Calvin B. Davis  
Member



François Bastien  
Member

DATED at Ottawa this 1st day of December, 1993.

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# Information

This is not an official document. Only the Reasons for decision can be used for legal purposes.

## SUMMARY

International Association of Machinists and Aerospace Workers (IAM), applicant, Intair Inc., Les Lignes aériennes Inter-Québec Inc., 2847-8451 Québec Inc. and Teamsters, Brewery, Soft Drink and Miscellaneous Workers' Union, Local 1999, respondents, and Canadian Air Line Pilots Association, mise-en-cause.

**Board Files:**  
 530-1955  
 560-259  
 585-425

**Decision No.: 1042**

This decision deals with a sale of business within the meaning of sections 44 and 46 of the Canada Labour Code.

The Board must determine two issues: the extent or scope of the sale as well as the date the sale took place.

Concerning the first issue, the Board concludes that a partial sale within the meaning of section 44 took place between Intair Inc., Inter-Québec and Inter-Canadian. This partial sale involved the purchase through Inter-Québec of all the regular flight operation components of a company called Intair Inc. This included all tangible and non tangible assets of this operation.

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

## RESUME

L'Association internationale des machinistes et des travailleurs de l'aérospatiale (AIM), requérante, Intair Inc., Les Lignes aériennes Inter-Québec Inc., 2847-8451 Québec Inc. et Union des routiers, brasseries, liqueurs douces et ouvriers de diverses industries, section locale 1999, intimés, et l'Association canadienne des pilotes de lignes aériennes, mise en cause.

**Dossiers du Conseil:**  
 530-1955  
 560-259  
 585-425

**Décision n°: 1042**

Cette affaire traite d'une question de vente d'entreprise au sens des articles 44 à 46 du Code.

Le Conseil doit trancher deux questions: l'étendue ou la portée de la vente ainsi que la date à laquelle elle aurait eu lieu.

En ce qui concerne la première question, le Conseil conclut qu'une vente partielle d'entreprise au sens de l'article 44 du Code est intervenue, visant Intair Inc., Inter-Québec et Inter-Canadian. Cette vente partielle a entraîné l'acquisition, par le biais corporatif d'Inter-Québec, de toutes les composantes reliées à l'exploitation des services réguliers de la compagnie appelée Intair Inc. Cela comprenait les éléments d'actif corporels et non corporels reliés à cette exploitation.



As to the date of the sale, the Board concludes that it did not occur at the time of closure, but rather on March 4, 1991, when the actual take-over process was initiated.

En ce qui concerne la date de la vente, le Conseil conclut qu'elle a eu lieu non pas à la conclusion (à la clôture) de tout le processus de réorganisation des entreprises, mais bien au 4 mars 1991, soit la date à laquelle le processus de prise de possession s'est engagé.

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Relations du  
Travail

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Reasons for decision

International Association of  
Machinists and Aerospace  
Workers (IAM),

applicant,

and

Intair Inc., Les Lignes  
aériennes Inter-Québec Inc.,  
2847-8451 Québec Inc. and  
Teamsters, Local 1999,

respondents,

and

Canadian Air Line Pilots'  
Association,

*mise-en-cause.*

Board Files: 530-1955  
560-259  
585-425

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The Board was composed of Mr. Serge Brault, Vice-Chairman,  
and Messrs. J. Jacques Alary and François Bastien, Members.

Appearances

Mr. Harold Lehrer, assisted by Mr. Raymond Landry,  
representing IAM District 721, for the International  
Association of Machinists and Aerospace Workers (IAM);

Mr. Gino Castiglio, assisted by Mr. Gilles Lafortune,  
business agent and organizer, for the Teamsters;

Mr. John T. Keenan, for the Canadian Airline Pilots'  
Association; and

Mr. Michel Towner, assisted by Ms. M. Dupont, Director,  
Human Resources.

These reasons for decision were written by Mr. Serge Brault,  
Vice-Chairman.

I

This constitutes the final step in a series of Board  
decisions and hearings concerning the acquisition by an  
affiliate of PWA, Canadian Regional Airlines (hereinafter

Regional) of an interest in Intair Inc. (Intair) and Lignes aériennes Inter-Québec Inc. (Inter-Québec). This decision has already been issued to the parties under letter-decision format (Intair Inc. et al., September 16, 1993 (LD 1201)).

The Board has before it an application for a declaration of a sale of business within the meaning of sections 44 to 46 of the Canada Labour Code (Part I - Industrial Relations). These sections read as follows:

"44. (1) In this section and sections 45 and 46,  
'business' means any federal work, undertaking or  
business and any part thereof;

'sell', in relation to a business, includes the  
lease, transfer and other disposition of the  
business.

(2) Subject to subsections 45(1) to (3), where  
an employer sells his business,

(a) a trade union that is the bargaining agent  
for the employees employed in the business  
continues to be their bargaining agent;

(b) a trade union that made application for  
certification in respect of any employees  
employed in the business before the date on which  
the business is sold may, subject to this Part,  
be certified by the Board as their bargaining  
agent;

(c) the person to whom the business is sold is  
bound by any collective agreement that is, on the  
date on which the business is sold, applicable to  
the employees employed in the business; and

(d) the person to whom the business is sold  
becomes a party to any proceeding taken under  
this Part that is pending on the date on which  
the business was sold and that affects the  
employees employed in the business or their  
bargaining agent.

45. (1) Where an employer sells his business and  
his employees are intermingled with employees of  
the employer to whom the business is sold, the  
Board may, on application to it by any trade  
union affected,

(a) determine whether the employees affected by  
the sale constitute one or more units appropriate  
for collective bargaining;

(b) determine which trade union shall be the  
bargaining agent for the employees in each such  
unit; and

(c) amend, to the extent the Board considers necessary, any certificate issued to a trade union or the description of a bargaining unit contained in any collective agreement.

(2) Where an employer sells his business and his employees are intermingled with employees of the employer to whom the business is sold, a collective agreement that affects the employees in a unit determined to be appropriate for collective bargaining pursuant to subsection (1) that is binding on the trade union determined by the Board to be the bargaining agent for that bargaining unit continues to be binding on that trade union.

(3) Either party to a collective agreement referred to in subsection (2) may, at any time after the sixtieth day has elapsed from the date on which the Board disposes of an application made to it under subsection (1), apply to the Board for an order granting leave to serve on the other party a notice to bargain collectively.

(4) On application being made to it pursuant to subsection (3), the Board shall take into account the extent to which and the fairness with which the provisions of the collective agreement, particularly those dealing with seniority, have been or could be applied to all the employees to whom the collective agreement is applicable.

46. Where any question arises under section 44 or 45 as to whether or not a business has been sold or as to the identity of the purchaser of a business, the Board shall determine the question."

Until the transactions in question, Intair and Inter-Québec were wholly owned subsidiaries of a third company - Corporation Intair Inc. (Corporation or Intair Group).

Intair and Inter-Québec were in reality two corporate entities, each with separate assets, but both jointly owned and operated. This whole constituted one and the same airline known publicly by the name Lignes Aériennes Intair. Together they were being operated in the spring of 1991 under the direction of Marc Racicot, their sole director.

Depending on the nature of the service provided or the equipment used, costs or liability were charged, for accounting purposes, to either Intair or Inter-Québec. Each had personnel and equipment that complemented one another.

The evidence essentially revealed that, despite their separate corporate structures, different job functions or work locations, all their personnel were managed in the same way as the rest, i.e., in an integrated and complementary manner. Everyone worked together to operate Lignes Aériennes Intair.

The airlines operated as a whole, and for a good reason - they were a whole. The Group offered regular air services, the so-called "scheduled" services, in various parts of Eastern Canada, principally in Quebec, and also operated charter flights. Bearing in mind yearly fluctuations, charter operations accounted for between 10% and 30% of Intair's activities.

Both the operation and the management of Intair and Inter-Québec were one and indivisible. Depending on the situation, a service, for example, sales or inflight services, was provided indistinctly by either of the two companies comprising the Group. This, moreover, was the case for the core services necessary for the operation of an airline. There was question once whether the employees of the two companies, at the time, were intermingled in a single group. Certainly pilots, mechanics and flight attendants are specialized and regulated jobs. A Fokker F-100 pilot was not interchangeable with a fellow pilot licensed to operate an ATR-42 turboprop aircraft and vice versa. In truth, this question is of little significance since the Board is not being asked to decide an application for a declaration of a single employer.

There were, however, a number of common services: sales and marketing; finance and administration; human resources; legal services; public relations; flight scheduling and crew assignment; flight management (i.e., control of the

commercial load); and all counter and ramp services, except in Quebec City.

The immediate events that gave rise to these proceedings involved a series of actions, initiatives and transactions between Corporation, Inter-Québec, Intair and Regional, among other parties.

To illustrate their extent and complexity, the Board notes that the closing agenda of these initiatives and transactions fills 14 pages and lists more than 70 steps spread over a period of several months in the spring of 1991. At the time, Regional purchased assets and/or shares of Intair Group. As a first step, Regional took control of Inter-Québec by purchasing its share capital. (Inter-Québec eventually became, following a change of corporate name, Inter-Canadien 1991 Inc. (hereinafter Inter-Canadien).) Regional then acquired a block of Intair's shares.

According to Regional and the Teamsters, the purchase of certain Intair assets constituted a partial sale of business within the meaning of section 44 of the Canada Labour Code. According to them, this partial sale occurred on June 1, 1991, a date to keep in mind. Regional described this sale as follows:

*"... there was a partial sale of business within the meaning of the Code between Intair Inc. and Inter-Canadien 1991 Inc. on June 1, 1991.*

*... the increase in the size of Inter-Canadien 1991 Inc. [formerly called Inter-Québec Inc.] since June 1, 1991, as the result of the said partial sale, is equal to the increase in the number of unionized employees at Inter-Canadien 1991 Inc. since June 1, 1991."*

(transcript of June 19, 1991, page 125;  
translation)

Inter-Canadien, described as the purchaser, is, it must be remembered, the new corporate name of Inter-Québec.

Thus, Regional acknowledges that a partial sale of business has formally taken place between the two divisions of the Group - Intair and the former Inter-Québec. Inter-Québec, as we stated, came under the control of Regional through the outright purchase of shares. According to Regional and the Teamsters, this was a simple transfer of shares that does not require the application of section 44 of the Code. In fact, they contend, that while Inter-Québec did change shareholders, it nonetheless remained intact, except for its corporate name. It thus continued to be bound by its collective agreements as if nothing had happened. This is not disputed.

However, according to the applicant, the International Association of Machinists and Aerospace Workers (the machinists or the IAM), the transactions relevant to the present dispute took place, for the purposes of the Code, in March 1991. In the IAM's view, these transactions, taken as a whole, constituted the sale of practically all of a single business, this business being Intair as an airline operation.

According to the IAM, these companies, like the Québecair group that preceded them, constituted, from the beginning, a single business within the meaning of section 35 of the Code, its formal components being Intair and Inter-Québec. This having been said, since the parties have agreed to leave pending the single employer application under section 35, there is no need to deal with it in order to dispose of this case.

II

Intair is a long-established airline. In fact, it dates back to the defunct Québecair group. At its inception, Intair Inc. was the result of the merger in 1988 of two companies: Gestion Québecair Inc. and Québecair - Air Québec Inc.

Québecair ceased to exist as an airline in the summer of 1986. Mr. Racicot and others purchased Québecair's regional transportation component and renamed it Intair. The IAM represented employees of this component who had more than a quarter century of seniority. When the purchase took place, they became employees of Intair and continued to be represented by their union through the operation of section 44 of the Code.

Inter-Québec, for its part, began its commercial operations under the name Nordair-Métro around 1987 and 1988. Inter-Québec was another holding of the same group. Inter-Québec, like Intair after 1986, had a certain range of personnel: pilots, flight attendants, ground employees and managers. Originally, it represented itself as being independent of the former Québecair and the former Nordair which was a minority shareholder in Inter-Québec (see document no. 59).

In 1988, the group comprising Intair and Inter-Québec went into business in association with PWA. It was then called Inter-Canadien (a name which would resurface in 1991).

However, its business association with PWA, which started in 1988, was slow to develop and failed. The association ended in the fall of 1989. On October 30, 1989, Intair Group continued its operations, but this time under the name Intair.

At Inter-Québec, the Teamsters were certified in 1987 for several bargaining units comprising all the staff. CALPA and the IAM intervened in these proceedings, claiming that Inter-Québec was merely a corporate veil concealing Québecair or Nordair in respect of whom they argued they were already certified. They consequently opposed the issuing of separate certifications for Inter-Québec, as well as the certification of the Teamsters. According to the IAM, if other ongoing legal proceedings instituted in 1986 had not prevented the Board from acting in the interim, the Teamsters would not have succeeded in 1987 in their argument that Inter-Québec and Intair were separate businesses and employers. Were it not for these other proceedings, they would not have been granted certification. (The proceedings to which the IAM refers are still pending in the Supreme Court).

The Board nevertheless certified the Teamsters, stipulating the following:

*"After examining the interveners' representations, the Board is of the opinion that there is no reason to delay the processing of these applications because of the recourse exercised by the said interveners following the presumed sale of Québecair. The Board panel dealing with the files relating to the said sale will decide in due course the arguments presented by the interveners."*

(Nordair Métro, letter of July 17, 1987, file nos. 555-2502; 555-2503; 555-2680; page 3; translation)

At the time, CALPA represented Intair's pilots. The IAM, for its part, represented Intair's ground personnel, office employees and flight attendants. (Following two raids, CUPE now represents all the flight attendants.) It should be noted that the collective agreements that the IAM signed in 1988 at Intair Inc. still name "Québecair" as the employer.

III

When the transactions at issue took place, Intair Group was about to cease, for all practical purposes, some of its operations. Since at least 1990, the Group had been on the verge of collapse and was in very serious financial difficulty. In fact, it was virtually bankrupt. The 1991 transactions with Regional, concluded after several months of negotiations, were part of a plan to rescue the company, a plan filed with the Superior Court in 1990 as part of legal proceedings instituted under the Companies' Creditors Arrangement Act, 1985, R.S.C., c. C-36.

The desperate situation of Intair Group and the transactions described above led to the dismantling of the Group. It formally terminated its scheduled air transport activities on May 31, 1991. However, it kept a few aircraft within Intair. These aircraft, Fokker F-100 jets, were used thereafter exclusively for charter operations. It thus withdrew completely from so-called "scheduled" air transport. Intair also signed an agreement not to compete, whereby it agreed not to resume the operation of a scheduled airline in Canada during the three years following the transaction.

It was mentioned that Intair had been planning, since 1990, i.e., before the 1991 transaction took place, to abandon certain business connections. We will have more to say on this subject later.

Prior to Intair's withdrawal from scheduled air transport, Regional formally took over Inter-Québec, as well as certain elements of Intair. The result, we are told, was a new regional carrier, Inter-Canadien. It began flying in June 1991. Put briefly, the reality was that Inter-Canadien was in fact continuing the scheduled services that had been

operating, until the eve of the takeover, under the name Lignes Aériennes Intair. However, Regional had decided to stop using Intair's F-100 jet aircraft on these routes and to increase Inter-Québec's fleet of ATR-42 turboprop aircraft.

This operation required personnel, expertise, equipment and a clientele. Inter-Québec's unionized personnel, represented by the Teamsters, remained with Inter-Canadien, with the exception of certain lay-offs. This personnel has kept its collective agreement and the Teamsters ever since.

As for Intair, all its personnel, who had much more seniority and who were represented by CALPA or the IAM, was officially scheduled to be laid off in the spring of 1991 because of the imminent cessation of the so-called "scheduled" services of Intair which in future would limit itself to charter services.

As we stated earlier, Regional, or Inter-Canadien, as a result of the 1991 transactions, acknowledged being the successor, within the meaning of the Code, to a part of Intair. However, it denied being bound by the collective agreements between Intair and the IAM, arguing that it was a party to only the agreements with the Teamsters. In short, there was a partial sale of business from Intair to Regional, but no transfer of the collective agreements.

Discussions were held and agreements reached, it is true, between the representatives of CALPA and the IAM, Intair and Inter-Canadien in the spring of 1991. The new employer announced at the time that it would hire some of Intair's employees. To qualify, these employees were required to resign from Intair and be formally rehired by Inter-Canadien under the Teamsters agreement. The IAM accepted this

arrangement under protest, subject to the present proceedings.

IV

The Board must decide two questions: the date on which a sale of business within the meaning of the Code allegedly occurred, and the extent or scope of this sale. It must address the latter question first.

Section 46 of the Code stipulates the following:

"46. Where any question arises under section 44 or 45 as to whether or not a business has been sold or as to the identity of the purchaser of a business, the Board shall determine the question."

**I: THE SCOPE OF THE ACQUISITION**

On March 1, 1991, Regional made a joint proposal to Corporation Intair Inc. and Lignes aériennes Inter-Québec. This proposal, contained in a document of some twenty pages, began with the following paragraph:

"This letter, upon acceptance, constitutes an agreement between Canadian Regional Airlines Ltd. ('Regional'), Corporation Intair Inc. ('Intair') and Lignes Aériennes Inter-Quebec Inc. ('Inter-Quebec') with respect to the sale and purchase of certain assets or, alternatively the shares, of Inter-Quebec, upon the following terms and subject to the following conditions: ..."

(document no. 40A); emphasis added)

Although this agreement was amended some fifteen times between March and June 1991, the above-quoted paragraph never was. Nor was the acceptance of the offer on March 4, 1991 by Intair and Inter-Québec.

Some argue that a contract of sale was established immediately upon the acceptance of March 4, 1991 by Intair Group. Others, however, view this transaction as a conditional or term promise of sale within the meaning of the Civil Code. One thing is clear: it is a contract, the substance of which provides for the acquisition, in one form or another, of the so-called "scheduled" services of an airline known as Lignes Aériennes Intair. If the final form of the acquisition continued to be a matter of discussion between the parties and subject to a number of conditions, there was agreement on the acquisition per se.

The Board's policy on these matters was adopted in Terminus Maritime Inc. (1983), 50 di 178; and 83 CLLC 16,029 (CLRB no. 402).

It is the substance, and not the form, of a transaction that the Board examines in applying section 44 (Seaspan International Ltd. (1979), 37 di 38; and [1979] 2 Can LRBR 213 (CLRB no. 190)).

The formal manner in which a new employer assumes control of a business is secondary. The question to be asked is whether the already existing business or of a part thereof continues on.

Moreover, a "business" within the meaning of the Code must not be confused with its corporate vehicle or vehicles. In the present case, the evidence clearly established that there was more than one corporate vehicle. However, there was one and the same airline - Intair. The definition of a business in section 44 refers to the following excerpt from section 2 of the Code which defines a federal work, undertaking or business as follows, having regard to the facts of the present case:

"'federal work, undertaking or business' means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

...

(e) aerodromes, aircraft or a line of air transportation,..."

Be that as it may, the fact that the Group comprised one business or two is of little consequence. Counsel for Inter-Canadien acknowledged that his client had purchased the "scheduled flights" (transcript of August 1, 1991, page 165; translation) of an airline. In light of the evidence, this meant a series of functional services provided in an integrated manner.

A business within the meaning of section 44 is defined in dynamic terms. In Terminus Maritime Inc., supra, the Board had already adopted a definition of a business<sup>1</sup> not unlike the one adopted subsequently by the Supreme Court of Canada in U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048:

*"Instead of being reduced to a list of duties or functions, the undertaking covers all the means available to an employer to attain his objective. I adopt the definition of an undertaking proposed by Judge Lesage in a subsequent case, Mode Amazone v. Comité conjoint de Montréal de l'Union internationale des ouvriers du vêtement pour dames, [1983] T.T. 227, at p. 231:*

[TRANSLATION] 'The undertaking consists in an organization of resources that together suffice for the pursuit, in whole or in part, of specific activities. These resources may, according to the circumstances, be limited to legal, technical, physical or abstract elements. Most often, particularly where there is no operation of the undertaking by a subcontractor, the undertaking may be said to be constituted when, because a sufficient number of those components that permit the specific activities to be conducted or carried out are present, one can conclude that the very foundations of the undertaking exist: in other words, when the undertaking may be described as a going concern. In Barnes Security, Judge René Beaudry, as he

<sup>1</sup> This definition is inspired by that adopted by the Ontario Labour Relations Board in Metropolitan Parking Inc., [1979] OLRB Rep. Dec. 1193, page 1205.

then was, expressed exactly the same idea when he stated, that the undertaking consists of "everything used to implement the employer's ideas".

...

... each case is unique in terms of adding a number of components to determine the foundations of the undertaking, in whole or in part. It is not always necessary for the movable and immovable property to be transferred, for specialized technical resources to be transferred, for inventory and know-how to be included in the transaction. There must however be adequate resources, directed towards a certain activity by the first employer, which are used by the second in an identifiable way for the same purposes in terms of the work required from employees, even if the commercial or industrial objective is different.

Precisely because of the need to identify in the second employer's operations the same use of operating resources transferred by the first employer (otherwise there would simply have been a transfer of physical assets which can be used for any purpose), it was found to be desirable to simplify matters and to say that, once the same activities were carried on by a second employer, it followed that the latter must have acquired sufficient operating resources from the first to ensure continuity of the undertaking. Some have gone even further and, seeking simple guidelines and accessible formulas, have purported to see passages in certain judgments as affirming a so-called occupational theory of the undertaking. This is an indirect way of getting around the problem of the legal relation, by reducing or indeed eliminating the practical necessity for a legal relation in the continuity of the undertaking.'

This definition has since received the approval of several judges of the Labour Court, and to the best of my knowledge it is the only one which takes into account the various legal operations required to bring s. 45 into operation. ..."

(pages 1105-1106)

In the present case, whether Inter-Canadien's acquisition took several forms does not alter the decisive fact for our purposes: once the transaction was completed, what remained of Intair Inc. was merely the shadow of its former self and was limited strictly to charter flights. All Intair's scheduled services either were acquired by Regional or disappeared. Moreover, an agreement not to compete had been signed, whereby Intair made a commitment to Regional not to resume any so-called "scheduled" flights.

Intair's reason for abandoning certain routes before June 1991 is not without significance. It was one thing for Intair Group to have decided before March to abandon some routes. However, under the agreements signed with Regional, Intair undertook not to engage in any commercial operations of this kind anywhere in Canada and in fact abandoned certain routes near and dear to PWA on March 11, 1991 (document 40A - article 4.7).

Clearly Intair abandoned certain routes for reasons that had nothing to do with PWA. However, it agreed contractually, to Regional's advantage, not to operate any scheduled airline. This fact manifestly was decisive in accelerating events at Intair. It knew in March that it was destined to disappear as a scheduled carrier and did not have the option of retaining these routes.

When the Board applies section 44, it must determine whether a business as a going concern has changed hands. In the present case, this fact is acknowledged for a part of Intair. Although Intair Inc. retained its charter flight services, almost all the remainder of Intair was acquired by Regional. This acquisition was the core of Intair and clearly constituted the vast majority, i.e., between 70% and 90%, of it. Moreover, what was formally transferred to Inter-Québec (alias Inter-Canadien) at Regional's initiative was already there operationally, if not in terms of working conditions.

As we saw, Intair, as a scheduled carrier, comprised different operational and intangible assets divided between Inter-Québec and Intair. Regional acquired Inter-Québec through a takeover and Intair through a transfer of assets. Thus, pilots, flight attendants of both Intair and Inter-Québec, aircraft, maintenance personnel, ground personnel, managers, offices, hangars, clienteles, etc., all came under

the control of the purchaser. In a word, PWA used its affiliate Regional to purchase a regional airline. Its purpose was to operate the part of the system it purchased and to close part of it down. For the purposes of the Code, almost all of an airline was thus purchased as a functional economic vehicle.

For reasons which in all likelihood have something to do with the Code, Regional argued initially that it had acquired only Intair's assets and did not therefore purchase a part of a business within the meaning of section 44 of the Code. This claim does not withstand scrutiny. This is undoubtedly why Regional changed its position later. Intair Inc.'s flight services, commercial management, supply personnel, sales, a part of operations, finance and administration, customer service, human resources, public relations - all these services that were formally attached to Intair - were acquired. Management and unionized personnel, licenses, aircraft, hangars and a clientele were transferred as elements of a coherent and functional whole.

Evidently, some services such as reservations were not fully acquired or were closed. It is our understanding that this occurred in cases where Regional or its parent company, PWA, already had an equivalent service that could ensure continuity.

According to the employer, the part of the business acquired corresponded with "the increase in the size of Inter-Canadien [consisting of] the increase in the number of unionized employees [as of] June 1, 1991" (see page 5 above).

This very narrow description, however, more accurately applies to the personnel retained by Regional after June 1. Given the evidence heard, a more accurate description would

refer to the whole business as a functional economic vehicle at the time that it was acquired. Consequently, the part of the business acquired by Inter-Canadien must be defined differently.

The Board is therefore of the opinion that a partial sale of business within the meaning of section 44 of the Code took place between Intair Inc. and Inter-Québec and Inter-Canadien. This partial sale consisted in the acquisition through the corporate intermediary of Inter-Québec of all the components related to the operation of the scheduled services of the company called Intair Inc. This also included both the tangible and intangible assets related to this operation.

The Board therefore declares that Inter-Canadien 1991 Inc., the corporate vehicle created to operate this acquisition, is bound by all the collective agreements in existence at Intair when the acquisition took place.

CALPA stated that it was not seeking any conclusions in the present case, so that our conclusion must be read as excluding CALPA. The same applies to CUPE in respect of the agreements governing the flight attendants. In fact, a decision has already been rendered that settles the matter once and for all between Inter-Canadien and CUPE.

#### II: THE DATE OF THE SALE

The debate on this question was long and the arguments presented were numerous. The date of the sale is considered of great significance in the present case, given the wording of section 44(2) (see page 2 above).

Counsel for the purchaser argued emphatically that the partial sale of business in the present case did not take

place until June 1991. The importance of all this lies in the fact that, under the Code, the purchaser is not bound by what happened prior to the date of the sale. Thus, it is argued, the employees laid off between March and June 1991 were laid off by Intair, with no consequences for the purchaser.

In view of our earlier conclusion concerning the extent of the partial sale, the Board has some doubt about the real significance of the date. In fact, under section 44(2), the purchaser is in any case bound by the collective agreements, as the successor on one date or another. It is also bound by proceedings arising from the application of these collective agreements.

However, the date of the sale remains a fundamental question because a sale within the meaning of the Code automatically triggers, as soon as it occurs, the application of the Code (Halifax Grain Elevator Limited (1991), 85 di 42; 15 CLRBR (2d) 191; and 91 CLLC 16,033 (CLRB no. 867)).

The Board examined the abundant documentation submitted by the parties. The negotiations between Regional and Intair lasted months. Then, on March 1, 1991, Regional made a formal offer (see page 11 above). Initially, the offer, which was accepted on March 4 by Intair Group, contained the following provision:

"4.4 Effective March 11, 1991, Regional shall enter into an agreement with Inter-Quebec in respect of management services pursuant to which Regional shall designate a person acceptable to Inter-Quebec, in their sole discretion, to manage the day-to-day operations of Inter-Quebec in cooperation with a management committee designated by Inter-Quebec. Said agreement shall provide for the provision of management services by such other personnel as the parties shall deem appropriate for a consideration equal to the cost of such services to Regional and shall include an indemnification and hold harmless clause to the effect that Regional shall be indemnified and held harmless from any claims, actions or costs

arising from management decisions and actions taken by the aforesaid designee of Regional and the persons under his control except in the case of recklessness or wilful misconduct on the part of Regional or persons for whom it is responsible at law."

(Document no. 40A); page 6)

Inter-Canadien thus had to manage the day-to-day operations of Inter-Québec beginning one week after acceptance of the offer.

Then, on March 14, the document was amended to read as follows:

"6. Paragraph 4.4 be and is hereby deleted in its entirety and replaced in stead [by] the following:

'Effective March 11, 1991, Regional shall appoint a person to act as a liaison with the management committee to be designed by Inter-Québec during the transition period from March 11, 1991 to and including the Closing Date.'"

(Document no. 103, page 2)

No one really explained the circumstances of or the reasons for this change.

As a question of fact, Paul Pelletier, then a general manager at PWA, moved into Intair's offices in March, in accordance with paragraph 4.4. The evidence concerning his exact role is contradictory, Mr. Pelletier himself not having been called as a witness.

At the time, Denis Tremblay, a trusted employee of Intair, officially remained in charge of day-to-day operations. His salary, however, was paid by Inter-Québec. His employer, Intair, had collapsed financially and had already accepted the offer of March 4, 1991. Mr. Tremblay summed up the situation: as early as March, the purchaser's intentions were known.

In accordance with the terms of the agreement, on March 11 Intair stopped flying to certain destinations which PWA would serve by seat equivalences (see document 40A, article 4.7). In short, the PWA family got rid of a competitor on certain routes and filled by other means the void that the abandonment of these routes might leave.

In April 1991, Intair began ATR-42 training for Inter-Canadien Fokker F-100 pilots. The purchaser did not operate the F100s and needed a number of crews to operate the ATR-42s that it intended to add to those that Inter-Québec already had. Although this was done at Intair's expense, it nevertheless indicates that the change-over was already under way. Steps were also taken to acquire additional ATR-42 aircraft.

Moreover, Mr. Tremblay, formerly vice-president of labour relations at Intair, began negotiating with all of Intair's unions. He signed agreements with the IAM, CALPA, etc. for the integration of some staff into Inter-Canadien. The terms of the agreements were in practice those that Inter-Canadien was prepared to accept. In fact, the personnel plans developed were submitted for Mr. Pelletier's approval and the agreements were signed by Inter-Canadien. Some services were abandoned because Inter-Canadien relied instead on other PWA affiliates as, for example, in the case of reservations.

There is one very important fact about these arrangements: the IAM signed them without prejudice to the present proceedings. One might think that, had all the interested parties dealt among themselves with all the consequences of this acquisition, the Board would not have had to become involved, other than to give full effect to these agreements. Such, however, was not the case.

Mr. Pelletier's role was described as secondary and merely designed to ensure that the agreement of March 4 was implemented with due diligence. However, our analysis of the evidence as a whole persuades us that he played more than a mere secondary role. Mr. Pelletier was already the designated boss; he was not a clerical employee; furthermore, he was on the premises.

However one might characterize his role, it is clear that in March, Inter-Canadien began playing a decisive role in policy, labour relations decisions, service closings and the ultimate fate of the components of Lignes Aériennes Intair. This airline was on its deathbed and Inter-Canadien and all the other parties were implementing step by step the transaction concluded in March. As Mr. Tremblay put it:

*"Okay, here it is. Under the terms and conditions of the transaction with Canadian Regional, Intair Inc. was to cease its scheduled flight activities in Quebec. It was therefore clear at that point - shall we say by mid-March - that the purchaser, Inter-Canadien, intended to replace Intair's system activities with an equivalence in terms of seats offered. Thus a part of Intair's activities were, as I believe someone here described it, transferred de facto to the purchaser, Inter-Canadien."*

*In the context of labour relations at Intair and Inter-Québec, this obviously posed a problem. Should Inter-Canadien take in the employees who were associated with this transfer of activities or simply hire from outside? This raised an important question that had to be resolved.*

*After discussion with the management of Inter-Canadien, it was agreed between employers to recognize that Intair's activities in the Quebec system had in fact been transferred to Inter-Québec."*

(transcript of August 1, 1991, pages 98-99;  
translation)

Later during his testimony, Mr. Tremblay said this:

*"MR. TREMBLAY: Well, what happened was that the current general manager of Inter-Québec, Mr. - excuse me, Inter-Canadien - Mr. Paul Pelletier, in fact took up his duties under the due diligence requirement for closing purposes around*

March 20. So, as soon as he arrived, I shared with him the making of Inter-Québec's decisions that had an impact beyond June 1, since he and Inter-Canadien and Canadian Regional were the ones who became financially responsible after June 1. So, during the transition period, we shared to some extent signing authority and powers to ensure that the transition went smoothly."

(transcript of August 1, 1991, page 184; translation)

What happened here is that, on March 4, Regional had decided to purchase and Intair Group had agreed to sell. This agreement certainly required a lot of subsequent work by both sides. However, for the purposes of the Code, the agreement was concluded. Between March and June, the parties implemented this agreement and, in short, transferred what had been acquired. Regional thus put in place, step by step, all the elements required to assume full control of the "scheduled" service of the airline transferred. On June 1, Regional was not beginning to take possession; it had practically completed the process. It was when this process began, i.e., on March 4, that Inter-Canadien 1991 Inc. succeeded Intair Inc. as employer for the purposes of section 44 of the Code (Intermountain Transport Ltd. (1984), 57 di 74; and 8 CLRBR (NS) 141 (CLRB no. 480):

"Especially when section 144(2)(c) is read in the context of the rest of section 144(2), it is clear that the collective agreement is meant to flow through without hiatus. It is not only after the sale that the collective agreement is binding on the successor, but also during the very process of the sale. Otherwise, the collective agreement could be completely undermined and the protection afforded by section 144(2) rendered illusory. The who and how of the selection of employees in the successor business is the most obvious example of where it is important that the collective agreement apply to the process of the sale. The Ontario Labour Relations Board has reached the same conclusion in Emrick Plastics Inc., [1982] 3 Can LRBR 163:

'We conclude, similar to the British Columbia Labour Relations Board, that section 63(2) of our own Act continues the effect of a collective agreement over a sale transaction without hiatus, and that the purchaser stands literally in the shoes of its predecessor with respect to any rights or obligations under that agreement. The

purchaser, in other words, is given no opportunity to "weed out undesirable employees" contrary to the provisions of the collective agreement, nor to decline to recognize any of the seniority or other rights accrued by employees under the collective agreement during their tenure with the predecessor employer. We agree with counsel for the respondent that the purchaser takes the business exactly as he receives it from the vendor. Even if, for example, employees have been given notice of termination by the vendor, the purchaser is no more entitled to start that business up without regard to the recall rights of employees under the collective agreement than the vendor would have been. The obligations of neither employer are determined by whether the employer on its own chose to treat a severance at a given point in time as a termination or a lay-off.

(pages 171-172)"

(pages 90-91; and 158-159)

According to the agreement of March 4, it was Regional's sole discretion to decide that the transaction would have the final form that it took. It was Regional, through Mr. Pelletier, that approved Inter-Québec's personnel plans well before June 1 and saw to it that the personnel, equipment and authorities it required would be available, trained and in place as its needs dictated.

It would be contrary to Parliament's intent to allow a reorganization whose implementation carried out, like the present one, over several months, through cooperation between the purchaser and the vendor, to be deemed not to have occurred until it was completed. In the instant case, and having regard to the evidence, this would be tantamount to hold the purchaser free from the consequences, in terms of labour relations, of a host of decisions made under its authority and in its interest beginning in March 1991.

This does not mean that any acquisition of a business in financial ruin necessarily binds the purchaser merely because he is holding serious discussions with the vendor. At the very most, this means that, when the sale within the meaning of section 44 of the Code is concluded and accepted,

and when the vendor's action is strictly within the potential dictates and the interest of the purchaser, the transfer within the meaning of section 44 then takes place.

As Mr. Justice George W. Adams of the Ontario Court of Justice writes in the latest edition of his work Canadian Labour Law:

"... An employer's right to independently rearrange its business or eliminate itself as an employer must be balanced with the need to protect employees from sudden changes in their bargaining rights. If employees are assured of a continuity in their collective bargaining rights upon a sale, industrial strife may be avoided. The successor provisions have a two-fold purpose: to protect the trade union's right to bargain and to protect any subsisting collective agreement from termination upon the sale."

George Adams, Canadian Labour Law, 2nd ed.  
(Aurora: Canada Law Book Inc., 1993), page 8-1)

Having regard to the evidence, section 46 of the Code leads us to conclude that the sale of business that took place in the present case occurred on March 4, 1991.

Although the Board does not consider this aspect a decisive one for its purposes, the Board examined, at the invitation of counsel, certain provisions of the Civil Code of Quebec within whose purview fall the transactions that occurred in the present case (see document no. 40A, article 6).

The Civil Code provides first that a sale "is perfected by the consent alone of the parties, although the thing sold be not then delivered" (article 1472).

According to some, the document of March 1 is a contract of sale that was perfected on March 4. According to counsel for Regional, it was a promise of sale subject to a series of suspensive conditions. Counsel termed it a "bilateral offer with suspensive conditions." According to him, the

transaction was therefore suspended pending fulfilment of certain conditions (or the renunciation of them).

First, one thing is obvious: the conditions were clearly fulfilled because the sale did in fact take place. Further, according to the Civil Code, the fulfilment of the condition has a retroactive effect from the day on which the obligation was contracted (article 1085). It thus follows that, if the transaction was subject to suspensive conditions, the fulfilment of the conditions made it retroactive to March 4. Moreover, it was on this date, according to the evidence, that the parties began to implement the agreement, and not on June 1. In other words, they did not wait until the "closing" of any "formal" act of sale (to quote the language of document 40A) to take delivery of Intair: the March agreement was sufficient.

In conclusion, and relying on the authority of section 46 of the Canada Labour Code (Part I - Industrial Relations), the Board determines March 4, 1991 as the date on which Regional acquired, for the purposes of section 44 of the Code, Intair's scheduled services. Consequently, Inter-Canadien 1991 Inc. has been bound, since March 4, 1991, by the collective agreements concluded between Intair (Québecair) and the IAM.

V

Conclusions

The Board invites the parties to meet with one another to discuss the practical consequences of the present decision, in particular the application of section 44(2).

The partial sale that took place in the present case resulted in the intermingling of the employees of Intair and Inter-Canadien 1991 Inc. (referred to herein previously as

Inter-Québec) to produce a single group of employees within the meaning of section 45(1) of the Code.

In this regard, the Board has already essentially resolved the question of the description of the new units (Intair Inc. et al., March 13, 1992 (LD 1003)).

There remains the question of which union will represent them. Employee lists were drawn up as of March 1, 1991. A number of employees were laid off. The Board believes, based on section 16(i) of the Code, that, given the present situation, a representation vote is appropriate to resolve this thorny question in the best interests of the parties. The IAM argued that some employees had been laid off unlawfully and should participate in the vote. A vote must be conducted among the employees who were in the Teamsters and IAM units as of March 4, 1991.

The Board will draw up lists of employees eligible to vote, based on the following criteria:

- (1) Employees currently working who were employees of Intair or Inter-Québec on March 1, 1991 in the units deemed appropriate, in accordance with the letter decision in Intair Inc. et al. (LD 1003), supra.
- (2) Employees laid off since March 1, 1991 who have taken the necessary steps to preserve their recall rights. In this regard, the Board considers eligible to vote all those who still have disputes pending with Inter-Québec or Intair over the existence of their recall rights.

However, those who have left Inter-Canadien permanently cannot participate in the vote.

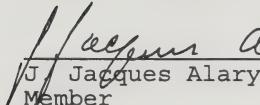
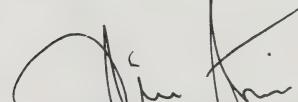
The Board will convene a meeting with the parties shortly in order to sort out the procedure and the form of this vote.

The Board designates Mrs. Suzanne Pichette, director of its Quebec Regional office, and any other senior labour relations officer she may designate, to assist the parties in implementing this decision.

Formal orders will follow containing the declaration of the partial sale of business made in the present case and the decision to hold a representation vote.



Serge Brault  
Vice-Chairman

  
J. Jacques Alary  
Member  
Francois Bastien  
Member

ISSUED at Ottawa, this 13<sup>th</sup> day of December 1993.

CCRT/CLRB - 1042



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## SUMMARY

**Dolphin Delivery Ltd.** (formerly **Tiger Transport Ltd.**), applicant, Canadian Brotherhood of Railway, Transport and General Workers, certified bargaining agent, and Graphic Communications International Union, Local 25-C (Vancouver Printing Pressmen, Assistants and Offset Workers Union, Local 25), intervenor.

Board File: 530-2176

Decision No. 1043

Canada Labour Code (Part 1 - Industrial Relations). Sections 3 (voluntary recognition), 16(p)(vi); 16(p)(viii); 18; 24, 38; 44; 45; 67.

Merger of two trucking companies owned by the same family holding. The first one (Tiger) was certified under the Code for a group of about 15 drivers represented by CBRT. The second one (Dolphin) was certified under British Columbia legislation for a province-wide unit of 400 drivers also represented by CBRT. In the spring of 1993, Tiger formally took over Dolphin and later changed its own name to Dolphin. Joint application to have federally issued Tiger certificate amended to show Dolphin as employer following the name change.

The Board determined that the corporate changes described constituted more than a mere change in name.

Ce document n'est pas officiel. Seuls les motifs de décision peuvent être utilisés à des fins juridiques.

## RÉSUMÉ

**Dolphin Delivery Ltd.** (anciennement **Tiger Transport Ltd.**), requérante, Fraternité canadienne des cheminots, employés des transports et autres ouvriers, agent négociateur accrédité, et **Graphic Communications International Union**, section locale 25-C (Vancouver Printing Pressmen, Assistants and Offset Workers Union, section locale 25), intervenant.

Dossier du Conseil: 530-2176

Décision n° 1043

Code canadien du travail (Partie I - Relations du travail). Articles 3 (agent négociateur), 16p(vi) et 16p(viii); 18; 24; 38; 44; 45 et 67.

Fusion de deux compagnies de camionnage appartenant à la même famille d'entreprises. La première (Tiger) est accréditée selon le Code auprès de la FCCET à l'égard d'un groupe d'environ 15 chauffeurs. La deuxième (Dolphin) compte environ 400 chauffeurs représentés aussi par la FCCET aux termes d'un certificat d'accréditation couvrant toute la province et délivré en vertu de la loi de Colombie-Britannique. Au printemps 1993, Tiger a officiellement pris possession de Dolphin et a par la suite changé son propre nom pour Dolphin. L'employeur et la FCCET ont présenté de concert une demande fondée sur l'article 18 du Code au Conseil afin qu'il change la désignation de l'employeur figurant sur le certificat d'accréditation fédéral initialement délivré au nom de Tiger.

Le Conseil a jugé que les changements d'entreprise décrits constituaient plus qu'un simple changement de nom.



The evidence showed that while being provincially certified, Dolphin had become a federal undertaking subject to the Code. The Board found that Dolphin was engaged in federal activities since at least 1985. Hence, its industrial relations were subject to the Code and the provincial certification issued for Dolphin was no longer applicable. CBRT was nonetheless found to hold a valid voluntary recognition pursuant to section 3(1) (bargaining agent).

The merger of Tiger and Dolphin constituted a sale of business under section 44. Hence, Tiger, as the buyer, was bound by Dolphin's collective agreement with CBRT.

The intermingling of their work-force triggered the application of section 45. Determination of which bargaining agent would take over the unit found to be appropriate. In this case, since the union at Dolphin and Tiger was the same, the issue was ultimately the determination of the collective agreement that will prevail. The Board discussed the approach to follow where the bargaining agent is the same for the two employers but where the collective agreements are different. The majority rule should normally apply.

The Board found that the original Dolphin unit was appropriate and that this group had an overwhelming majority; for these reasons, their collective agreement will prevail. The Board discussed whether CBRT should remain certified and decided that it should.

The existence and validity of the Dolphin agreement were discussed. According to the parties, Dolphin has an agreement which runs until 1998. The Board disagreed. On the other hand, Tiger's agreement expired in 1991 and was not renewed.

La preuve a démontré que bien qu'ayant une accréditation provinciale, Dolphin était devenue une entreprise fédérale assujettie au Code. Le Conseil a jugé que Dolphin a commencé à oeuvrer dans le secteur du transport interprovincial en 1985. Conséquemment, ses relations du travail relèvent de la compétence fédérale, et l'accréditation accordée aux termes de la législation provinciale est devenue caduque. Néanmoins, la FCCET a quand même été valablement reconnue volontairement par Dolphin comme agent négociateur aux termes du paragraphe 3(1) du Code (agent négociateur).

La fusion de Tiger et de Dolphin constitue une vente d'entreprise au sens de l'article 44 du Code. En conséquence, Tiger comme acquéreur est liée par la convention collective existante entre Dolphin et la FCCET.

L'intégration des personnels de Tiger et Dolphin ouvre droit à l'application de l'article 45 du Code. Détermination de l'agent négociateur qui prendra en charge la nouvelle unité jugée habile à négocier. En l'espèce, vu que le syndicat est le même chez Tiger et chez Dolphin, la question est de savoir quelle convention collective prévaudra. Le Conseil a discuté de la façon de décider de la question lorsqu'il y a un seul agent négociateur chez les deux employeurs, mais des conventions différentes. La règle de la majorité devrait généralement l'emporter.

L'ancienne entreprise Dolphin avait une unité habile à négocier qui comptait un nombre très supérieur d'employés; pour ces raisons, c'est sa convention qui prévaudra. Le Conseil s'est demandé si le syndicat devait conserver son accréditation et il a décidé que oui.

L'existence et la validité de la convention collective de Dolphin ont été discutées. Selon les parties, Dolphin avait une convention valide jusqu'en 1998. Le Conseil ne partage pas cet avis. Du côté de Tiger la convention collective s'est terminée en 1991 et n'a pas été renouvelée.

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The 1989-95 Dolphin collective agreement was terminated by Dolphin and CBRT in December 1992. A so-called new five-year agreement was signed in January 1993 by Dolphin and CBRT. The parties explained that a customer had insisted on long-term labour relations stability. The union explained that it did not want to face yearly raids.

The Board raised the application of section 67(2) which forbids parties to modify the term of a collective agreement in a case like this one. The extension and purpose of that provision were reviewed. That provision is aimed at protecting the individual employees' freedom to choose a bargaining agent and at ensuring industrial peace.

The Board found a violation of section 67(2). It found the new duration clause invalid and other changes valid. The Board indicated that the open periods would remain those determined under the initial duration clause.

The Board ordered the posting of these reasons for decision.

La convention collective de Dolphin qui devait courir de 1989 à 1995 a été modifiée par les parties pour se terminer en décembre 1992. Une soi-disant «nouvelle» convention de cinq ans a été conclue en janvier 1993 par Dolphin et le syndicat. Les parties ont expliqué qu'un client avait insisté pour une paix industrielle durable. Le syndicat a expliqué qu'il souhaitait éviter des périodes de maraudage annuelles.

Le Conseil a soulevé la question de l'application du paragraphe 67(2) qui interdit aux parties de modifier la durée d'une convention collective dans les circonstances semblables. L'étendue et la raison d'être de cette prohibition ont été étudiées. Cette disposition vise la protection de la liberté d'association et le maintien de la paix industrielle.

Le Conseil a jugé qu'il y avait eu violation du paragraphe 67(2) et a jugé invalide la nouvelle clause de durée. Le Conseil a jugé les autres modifications valides. Le Conseil a indiqué que les périodes ouvertes demeurerait ce qu'elles étaient selon la clause initiale sur la durée.

Le Conseil a ordonné l'affichage de ces motifs dans les lieux de travail.



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Reasons for Decision

Dolphin Delivery Ltd.  
(formerly Tiger Transport  
Ltd.),

applicant,

and

Canadian Brotherhood of  
Railway, Transport and  
General Workers,

*certified bargaining agent,*

and

Graphic Communications  
International Union, Local  
25-C (Vancouver Printing  
Pressmen, Assistants and  
Offset Workers Union, Local  
25),

*intervenor.*

Board File: 530-2176

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The Board was composed of Mr. Serge Brault, Vice-Chair,  
and Messrs. Calvin B. Davis and Robert Cadieux, Members.

Appearances

Mr. Israel Chafetz, accompanied by Mr. Morris Peter,  
President, Dolphin Delivery Ltd., and Ms. Goldner, counsel  
in the firm of Mr. Chafetz, as observer, for Dolphin  
Delivery Ltd.;

Ms. Leah Terai, accompanied by Mr. Harry Moon, Business  
Representative, and Mr. René Moreau, National Vice-  
President, for the Canadian Brotherhood of Railway,  
Transport and General Workers; and

Mr. Casey McCabe, accompanied by Mr. Bob Osipa, President,  
and Mr. Greg Moysiuk, Shop Stewart, for the Graphic  
Communications International Union, Local 25-C.

These reasons for decision were written by Mr. Serge  
Brault, Vice-Chair.

I

The Application

This is an application initially filed pursuant to section 18 of the Canada Labour Code (Part I - Industrial Relations) by Tiger Transport Ltd. (Tiger) jointly with Dolphin Delivery Ltd. (Dolphin), which are both companies owned by Morris and Antoinette Peter, a husband and wife team. Together, they control a group of 11 companies, all involved in the trucking industry. We will later refer to the Peters' companies as the Group. Their application is aimed at consolidating two bargaining units following the merger of two of their companies. Section 18 provides as follows:

"18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application."

The Canadian Brotherhood of Railway, Transport and General Workers (CBRT) supported the Group's application. The CBRT has been certified with this Board since 1985 for a small group of Tiger drivers. The same union is also certified under British Columbia legislation for the much larger group of Dolphin drivers.

This application led to the filing of a request to intervene by the Graphic Communications International Union, Local 25-C (Pressmen). They are certified under British Columbia legislation for a group of truck drivers working for Pacific Press Limited (Pacific) in Vancouver, which is not a party to these proceedings.

A hearing into this application was held in Vancouver, B.C., on August 4, 1993.

The Board's officer assigned to this file summarized the issues before the Board as follows:

"The applicant seeks to have the Board amend an Order dated December 20, 1985 certifying the Canadian Brotherhood of Railway, Transport and General Workers (CBRT) for a unit of employees of Tiger Transport Ltd. to:

a) reflect the new name of the employer as Dolphin Delivery Ltd. pursuant to a change of name from Tiger Transport Ltd. to Dolphin Delivery Ltd. and,

b) to define the bargaining unit to read as follows in recognition of the fact that Dolphin Delivery Ltd. operated at and from several locations in British Columbia:

'all employees of Dolphin Delivery Ltd. in British Columbia excluding office and sales staff.'

The company, Dolphin Delivery Ltd., was in existence prior to Tiger Transport Ltd. changing its name. As well, the Canadian Brotherhood of Railway, Transport and General Workers presently holds a provincial certificate of bargaining authority issued by the British Columbia Labour Relations Board for a unit of employees of Dolphin Delivery Ltd. A copy of this Certificate which also named two sister companies as a single employer, was appended to the CBRT's reply to this application and appears on the Board's file."

What Tiger was initially seeking was characterized as a simple change in name to substitute "Dolphin" with "Tiger" on the certificate issued by this Board in 1985 following the merger of the two companies.

The case turned out to be more complex than initially anticipated, as it raised a series of questions pertaining to the application of section 44 et seq. (sale of business) as well as section 67 of the Code. These provisions read as follows:

"44. (1) In this section and sections 45 and 46,

'business' means any federal work, undertaking or business and any part thereof;

'sell', in relation to a business, includes the lease, transfer and other disposition of the business.

(2) Subject to subsections 45(1) to (3), where an employer sells his business,

(a) a trade union that is the bargaining agent for the employees employed in the business continues to be their bargaining agent;

(b) a trade union that made application for certification in respect of any employees employed in the business before the date on which the business is sold may, subject to this Part, be certified by the Board as their bargaining agent;

(c) the person to whom the business is sold is bound by any collective agreement that is, on the date on which the business is sold, applicable to the employees employed in the business; and

(d) the person to whom the business is sold becomes a party to any proceeding taken under this Part that is pending on the date on which the business was sold and that affects the employees employed in the business or their bargaining agent.

...

67. (1) Where a collective agreement contains no provision as to its term or is for a term of less than one year, the collective agreement shall be deemed to be for a term of one year from the date on which it comes into force and shall not, except as provided by subsection 36(2) or with the consent of the Board, be terminated by the parties thereto within that term of one year.

(2) Nothing in this Part prohibits the parties to a collective agreement from agreeing to a revision of any provision of the collective agreement other than a provision relating to the term of the collective agreement.

(3) The Board may, on application made jointly by both parties to a collective agreement, order that the termination date of the collective agreement be altered for the purpose of establishing a common termination date for two or more collective agreements binding a single employer."

II

The Facts

One of the questions raised in this case is the fact that Dolphin is provincially certified, while Tiger is federally certified. As such, Dolphin is a fairly large operation. Its staff of over 400 has been certified provincially in British Columbia with the CBRT since 1978. At the time, Dolphin was only engaged in intraprovincial trucking, within British Columbia. In the mid-1980s, the Group obtained transport licenses from a number of provinces in Canada as well as from different states in the USA. This led to Dolphin's expansion in all of Western Canada and into the USA as well as eastward, as far as Ontario and Quebec. At that time, Dolphin, while remaining provincially certified, started to do regular business outside of British Columbia.

For its part, Tiger was certified with this Board in 1985. The Group submitted that, at the time, Tiger was its only company engaged in extraprovincial transportation activities. As things evolved, both Dolphin and Tiger got into extraprovincial trucking. Currently, part of Dolphin's business involves the handling and sorting of expedited parcels within the greater Vancouver area for Canada Post Corporation (Canada Post). It generates activities which range in the 20-million-dollar-a-year figure.

(Dolphin is one of the respondents in proceedings initiated by the Canadian Union of Postal Workers which are currently before the Board, pending the outcome of a judicial review application (Muir's Cartage Ltd. and Canada Post Corporation (1992), 89 di 12; 17 CLRBR (2d)

182; and 92 CLLC 16,060 (CLRB no. 955)). Dolphin does not challenge the fact that it is under federal jurisdiction for the reasons set out in Muir's Cartage Ltd. and Canada Port Corporation, supra.

The Group has filed numerous documents establishing the nature as well as the extent of Dolphin's extraprovincial trucking business, which accounts for around 10% of its overall activities.

The evidence adduced also establishes that the two companies are now operated in a fully integrated fashion under the authority of Mr. Peter.

As far as labour relations are concerned, Tiger and Dolphin were certified with the same union, CBRT, but by different boards acting under separate constitutional authorities. As things stand, we have two initially distinct operations now being merged into one: Dolphin, by far the largest one which is provincially certified, is formally being taken over by the much smaller Tiger, which is federally certified. From an operational point of view, the integrated entity is extraprovincial.

The evidence revealed that the parallel operation of Tiger and Dolphin as separate entities has long been a bone of contention between management and union. The reason for that was that some of the drivers of Tiger or Dolphin did in fact move from one company to the other on a regular basis in order to increase their earnings. The union contested the fact that Tiger and Dolphin should be subject to different collective agreements as well as labour-standards and labour legislations, while their work-force was all but integrated. These union concerns

have been a standard feature at the bargaining table for a number of years before an arrangement was reached at the last round of negotiations providing for the formal merger of Dolphin and Tiger. A CBRT representative testified that these concerns had been brought to the forefront when the union faced a raid by the Teamsters and where this problem was perceived as crucial.

It was agreed at the Dolphin bargaining table that the employer would seek to have the matter of the merger of units resolved before this Board. In order to achieve that, the parties came up with the idea that instead of Dolphin taking over Tiger, they would do the opposite: Tiger would formally buy Dolphin and then it would change its own name to Dolphin. This, in the parties' mind, would have allowed for the two bargaining units to be merged into one and for all employees to end up under the now federally regulated Dolphin 1993-98 agreement.

What was described as Dolphin's most recent collective agreement with CBRT was signed on January 29 of this year. It has a five-year term running from January 1, 1993, to December 31, 1997. A fact material to our decision is that the "previous" agreement covering Dolphin initially had a term running from September 18, 1989 until April 30, 1995. Pursuant to the memorandum of agreement signed by Dolphin and the union in January of this year, the 1989 agreement was modified so as to terminate on December 31, 1992, and not 1995. At the same time, a "new" Dolphin agreement was entered into, starting in January 1993 and running until 1998. This arrangement led the Board to raise the issue of the application of section 67(2) to the instant case.

The applicant and the union recognize that the latter agreement they signed in 1993 did not apply to Tiger. As for Tiger, its previous collective agreement expired in 1991.

Early this year, all necessary paper work was done, but instead of an actual merger or takeover, the Group resorted to a transfer of assets between the two corporate entities whereby Dolphin's assets moved on to Tiger. Tiger then proceeded to change its name to Dolphin. The end result of all this corporate shuffling was that there was an extensive transfer of business as well as of tangible and intangible assets between the two.

With respect to the reason behind the change in the term of the collective agreement, the parties explained that they both wanted to achieve industrial peace on a long-term basis. They were influenced in that by the Canada Post contract insofar as Canada Post had expressed some concern over the necessity for long-term labour relations stability before it would award a contract of any significance to Dolphin.

Now a word about the Pressmen's request to intervene. In the spring of 1993, the Group was awarded a contract by Pacific for the local delivery of their newspaper in the Vancouver area. This prompted the Pressmen that are provincially certified for Pacific's truck drivers to intervene in this case. According to the Pressmen, this business arrangement between Pacific and Dolphin is the actual disposition of part of Pacific's business and falls under section 44 of the Code. They also contend that the Dolphin and Tiger restructuring was in fact a screen to prevent them from having the then provincially regulated

Dolphin declared bound under British Columbia legislation by the Pressmen's collective agreement with Pacific. By removing Dolphin from under provincial jurisdiction, the British Columbia labour legislation would no longer apply to Dolphin.

At the time of the hearing, the Pressmen and Pacific were in arbitration over the legality of the Pacific/Dolphin arrangement. The union was seeking to have the deal declared null and void under their collective agreement.

Following an understanding between all concerned that the instant decision would not affect the Pressmen's rights to come back before this Board following the issuance of the arbitration award, the Pressmen withdrew from the hearing. Accordingly, we need not rule on their submissions on their merits.

### III

#### Analysis

This application raises three issues that the Board will address.

- A. The constitutional jurisdiction over the business of Dolphin before its formal takeover by Tiger

The interest of this question stems from the fact that depending on whether Dolphin was federally regulated before the merger, the extent of this Board's authority over Dolphin's dealings with Tiger and CBRT will vary.

The unchallenged evidence establishes without a doubt that Dolphin has been engaged in extraprovincial trucking since 1985. Dolphin's extraprovincial activities have been ongoing for over eight years. In particular, such was the situation when Dolphin and CBRT signed their 1989 collective agreement.

It is not uncommon for a business initially under federal jurisdiction to evolve into provincial jurisdiction or vice versa. One precedent is the case involving Brewster Bus Lines (Brewster Transport Company Limited (1986), 66 di 1; 13 CLRBR (NS) 339; and 86 CLLC 16,040 (CLRB no. 574); pages 42; 380-381; and 14,387). Brewster started as a local bus tour operator, in the Alberta Rockies. It was certified under Alberta labour legislation. With time, Brewster's operations evolved into long-haul transportation, taking tours all over the country and into the USA. Later, it was bought by the Greyhound Group and integrated into its network. All the while, it kept its Brewster name and continued to be operated under Alberta legislation, up until a labour dispute erupted. Then the matter of jurisdiction had to be addressed and the issue sorted out.

In the decision referred to above, the Board reiterated that jurisdiction is above all a matter of fact. With time, Brewster's local operations had evolved extraprovincially and the Alberta certificate had for all intents and purposes become obsolete for lack of jurisdiction. While the certificate was obsolete, the collective agreement between Brewster and its union was not, and it had nonetheless generated a valid voluntary recognition of the union. This was made possible by section 3 of the Code:

"3. (1) In this Part...

'bargaining agent' means

...

(b) any other trade union that has entered into a collective agreement on behalf of the employees in a bargaining unit

(i) the term of which has not expired, or

(ii) in respect of which the trade union has, by notice given pursuant to subsection 49(1), required the employer to commence collective bargaining."

That is also the case for Dolphin. Dolphin's labour relations for the unit initially covered by the British Columbia certification is in law a voluntary recognition governed by federal legislation and has been so for a number of years. We need not decide except to say that the collective agreements entered into in 1989 or 1993 for that unit come under federal legislation.

The description we have of Dolphin's activities satisfies the regularity test set out by the jurisprudence (Re Ottawa-Carleton Regional Transit Commission and Amalgamated Transit Union, Local 279 et al. (1983), 44 O.R. (2d) 560; 4 D.L.R. (4th) 452; and 84 CLLC 14,006 (C.A.)). Even without their postal business, Dolphin's extraprovincial trucking activities, while only representing a minor portion of its business, nevertheless remain ongoing, regular and systematic.

As for Tiger, it has been and remained throughout a federal undertaking subject to this Code.

B. The characterization of the Tiger/Dolphin takeover and its effects under the Code

Since Tiger and Dolphin are both federal employers, it is necessary to determine the precise nature of the arrangement they made. Tiger initially described it as a mere change in name. This explains why they applied under section 18 of the Code simply to have the employer's name changed on Tiger's certification order. As was later recognized by counsel, what in effect took place was a genuine consolidation of two federal businesses coming under the notion of transfer in section 44 of the Code:

"44.(1) In this section and sections 45 and 46,

...

'sell', in relation to a business, includes the lease, transfer and other disposition of the business."

(See Terminus Maritime Inc. (1983), 50 di 178; and 83 CLLC 16,029 (CLRB no. 402), and Thorco Manufacturing Ltd. (1965), 65 CLLC 16,052 (OLRB).)

Hence, Dolphin's and Tiger's integration was a sale of business. It follows that section 44(2) was automatically triggered (Halifax Grain Elevator Limited (1991), 85 di 42; 15 CLRBR (2d) 191; and 91 CLLC 16,033 (CLRB no. 867)):

"44.(2) Subject to subsections 45(1) to (3), where an employer sells his business,

(a) a trade union that is the bargaining agent for the employees employed in the business continues to be their bargaining agent;

...

(c) the person to whom the business is sold is bound by any collective agreement that is, on the date on which the business is sold,

*applicable to the employees employed in the business;..."*

No one challenges the fact that Tiger as the formal buyer is bound by Dolphin's collective agreement since we have now determined that Dolphin was also a federal employer at the time of the transaction.

But what about Tiger's own collective bargaining situation? The union is, for all intents and purposes, a co-applicant in this application. CBRT recognizes and has established that there is a total intermingling of employees between Dolphin and Tiger. This in turn warrants the application of section 45 and, in passing, further establishes that this is not a mere name change:

*"45. (1) Where an employer sells his business and his employees are intermingled with employees of the employer to whom the business is sold, the Board may, on application to it by any trade union affected,*

*(a) determine whether the employees affected by the sale constitute one or more units appropriate for collective bargaining;*

*(b) determine which trade union shall be the bargaining agent for the employees in each such unit; and*

*(c) amend, to the extent the Board considers necessary, any certificate issued to a trade union or the description of a bargaining unit contained in any collective agreement.*

*(2) Where an employer sells his business and his employees are intermingled with employees of the employer to whom the business is sold, a collective agreement that affects the employees in a unit determined to be appropriate for collective bargaining pursuant to subsection (1) that is binding on the trade union determined by the Board to be the bargaining agent for that bargaining unit continues to be binding on that trade union."*

(emphasis added)

On the one hand, we have before us the ex-Dolphin province-wide unit of about 400 employees. On the other

hand, we have Tiger's federally certified unit consisting of 10 or 12 employees. Both units are represented by CBRT.

Section 45(2) does not empower the Board to choose between collective agreements in the case of intermingling. Rather, it empowers the Board to determine under section 45(1)(b) which bargaining agent will take over the unit found appropriate pursuant to section 45(1)(a). That determination is usually based on numbers, i.e. on union support, as the foremost factor (Eastern Canada Towing Ltd. (1977), 24 di 152 (CLRB no. 102)). Such determination will entail the implicit determination of which collective agreement shall apply from then on as the agreement will be that of the bargaining agent chosen to take over. As mentioned, the determination of the bargaining agent is based on union support unless other factors (such as location, unfair labour practices, etc.) warrant otherwise. Here, although we have two CBRT units, one voluntarily recognized and one certified, it is clear that the Dolphin group is by far the dominant one. It is trite law that the determination of which group has majority support does not require a representation vote (Seaspan International Ltd. (1979), 37 di 38; and [1979] 2 Can LRBR 213 (CLRB no. 190)). Furthermore, it would be impossible to hold a vote where only one union is involved.

Unless compelling reasons relating to the appropriateness issue warrant otherwise, the proper way to apply section 45(2) where two units being merged belong to the same union is similar to the one used when competing unions are involved... The Board should decide on the basis of the number of employees in each original unit.

Currently, the Dolphin voluntary recognition applies at all of the Group's locations and to all but a few employees. With regard to appropriateness, there is no doubt that an all-location and all-employee unit is warranted. That is precisely the scope of the Dolphin unit. Hence, since between the two CBRT units, it is the Dolphin unit that is appropriate and has the most members, the Dolphin collective agreement will consequently apply to the consolidated unit.

Author Graham J. Clarke rightly points out in his book Canada Labour Relations Board: An Annotated Guide (Aurora, Ont.: Canada Law Book Inc., 1993), the effect of a finding under section 45(1)(b) where following a vote between rival unions, the one called upon to take over the intermingled unit is voluntarily recognized rather than certified. Commenting on Newfoundland Steamships Ltd. (1981), 45 di 156; and 2 CLRBR (NS) 40 (CLRB no. 331), he writes:

"While the Board determines which union will be the bargaining agent, this does not involve certification. A voluntarily recognized agent retains its non-certified status even after the Board exercises its powers under this section. If the bargaining agent wants to be certified it will have to apply for certification just as all other unions do."

(page 1/268)

In the instant case, we have CBRT on both sides of the equation: one where it was voluntarily recognized (Dolphin); the other where it was certified (Tiger). Furthermore, there can be no vote in this case as there is no opponent. The end result of our findings under section 45(2) is that CBRT, in its "Dolphin" so to speak capacity, is to remain the bargaining agent for the new unit since the Tiger CBRT lacks the support. Hence, on the basis of

the case law referred to earlier, the CBRT should normally expect to remain as the voluntarily recognized bargaining agent and to see its Tiger certification cancelled.

The approach taken in Newfoundland Steamships Ltd., supra, does not, however, account for the particular situation where there is a single union federally certified on one side and voluntarily recognized on the other. Here the CBRT's Tiger unit is all but integrated in the CBRT Dolphin unit. One can wonder from a broader labour relations perspective why the union should not retain its certification, provided that certain conditions are met.

The merger taking place here is akin in its effects to the situation where a certified union seeks to expand the scope of its certification to include previously excluded employees (see Teleglobe Canada (1979), 32 di 270; [1979] 3 Can LRBR 86; and 80 CLLC 16,025 (partial report) (CLRB no. 198)). In such a case, the Board has said that it would allow such an extension if it was done in compliance with the rules of certification, particularly with regard to union support. Specifically, the Board said that if the union enjoyed majority support within the group added to its original unit, then it would allow the extension of the certification to the new group. In this case, the evidence shows that the CBRT has a closed shop provision in its collective agreement, a provision which satisfies the union support requirement set out in Teleglobe Canada, supra.

For these reasons, and because of this particular set of circumstances, the Board will not cancel the CBRT certification issued for Tiger but amend it so as to make it applicable to the newly constituted company.

In the same vein, the CBRT will keep its Dolphin collective agreement since the "winning" bargaining agent under section 45(1)(b) takes along its collective agreement. Section 45(2) provides as follows:

*"45.(2) Where an employer sells his business and his employees are intermingled with employees of the employer to whom the business is sold, a collective agreement that affects the employees in a unit determined to be appropriate for collective bargaining pursuant to subsection (1) that is binding on the trade union determined by the Board to be the bargaining agent for that bargaining unit continues to be binding on that trade union."*

This takes us to the third issue we need to address.

C. The issue of the applicability of section 67 of the Code to the 1993 collective agreement(s) of Dolphin and CBRT

As mentioned earlier, CBRT and Dolphin negotiated a new contract early this year. They substituted it with the one agreed to in 1989 for a term that was due to expire on April 30, 1995. Changing the term of a collective agreement is prohibited in our jurisdiction.

Section 67(2) (see page 4) allows the amendment to any provision of a collective agreement other than its term clause. As the Board said in Pacific Coast Terminals Co. Ltd. and Vancouver Wharves Limited (1992), 87 di 113; 17 CLRBR (2d) 238; and 92 CLLC 16,033 (CLRB no. 922):

*"... As circumstances change, or as new or unforeseen situations crop up, employers and trade unions are free to mutually agree to adjust or to expand upon the terms and conditions dictated by the collective agreement. In fact, parties to a collective agreement can renegotiate any provision of a collective agreement during the life of the*

agreement other than its term (section 67(2) of the Code)."

(pages 117-118; 242; and 14,234)

The reason for the section 67(2) prohibition to tamper with the term of a collective agreement is two-pronged. First, it has to do with employees' individual rights. Second, it has to do with the proper operation of the Code from a broader labour relations perspective.

From the perspective of individual rights, employees' rights turn on their basic freedom to belong to the union of their choice (section 8(1)). Conversely, there is the right to change unions or to do away with union representation. These rights are directly linked in the North American system of free bargaining to what is commonly referred to as the "open period." In our Code this is governed by sections 24 (certification) and 38 (revocation). In both cases, the open period varies depending upon the existence or the term of a collective agreement. At regular intervals, employees take advantage of the possibility of changing or revoking unions as bargaining agents. If employers and unions were recognized the unqualified right to reopen collective agreements with regard to their term, they could in fact deprive individual employees, and consequently rival unions, of the possibility of ever displacing the incumbent union. Parliament through the clear prohibition of section 67(2) prevents the open period from being transformed into an ever moving target. Once a contract is signed, the parties lose the privilege of changing its term, and the open period becomes frozen.

The second set of reasons for the section 67(2) prohibition has to lie in the right to strike found at

section 89 or, more fundamentally, in the duty to bargain collectively in good faith at section 48. That duty is formally triggered by the issuance by either party of a notice pursuant to section 49. The time a party is entitled to issue such a notice is directly linked to the "date of expiration of the term of a collective agreement." There again, if that date were allowed to change, recourse to job action in order to bring about a settled agreement would forever be eliminated. When employees are dissatisfied with a proposal, they may resort to job action, much like employers may resort to lockout. That right to resort to economic pressures to settle collective bargaining impasses is a fundamental characteristic of our system. Insofar as this right is strictly regulated on the basis of the existence or term of collective agreements, Parliament did not want collective agreements that could make the right to strike or to lock out impossible to exercise. Such an event is contrary to the overall scheme of free collective bargaining, at least in non-essential industries.

If we turn to the case at hand, we see that Dolphin's initial contract was for five and a half years (April 1989 to September 1995). Accordingly, its open period was governed by section 24(2) (d) :

"24.(2) Subject to subsection (3), an application by a trade union for certification as the bargaining agent for a unit may be made

...

(d) where a collective agreement applicable to the unit is in force and is for a term of more than three years, only after the commencement of the thirty-fourth month of its operation and before the commencement of the thirty-seventh month of its operation and, thereafter, only

(i) during the three month period immediately preceding the end of each year that the

collective agreement continues to operate after the third year of its operation, and

(ii) after the commencement of the last three months of its operation."

This meant that CBRT could be raided between January and April 1992. We understand that the Teamsters did indeed attempt to raid CBRT during the period in 1992. We also understand that, under the Code, such attempts were allowed during the same period of each subsequent year until 1995, as well as during the summer of 1995. Identical open periods are provided for under section 38 with regard to revocation applications.

In their negotiations, Dolphin and CBRT retroactively terminated the 1989-95 contract in December 1992. They then agreed to what they called a "new" five-year contract. In so doing, not only did they close the 1993 open period, but they pushed back any new open period by three years, thanks to the effect of section 24(2)(d). How? Under that provision, a five-year collective agreement has its first open period "after the commencement of the thirty-fourth month of its operation." (See William E. Blonski (1984), 56 di 222; 8 CLRRB (NS) 111; and 84 CLLC 16,054 (CLRB no. 476); and Pacific Coast Terminals Co. Ltd. and Vancouver Wharves Limited, supra.)

Whether we like it or not, the Board has no authority whatsoever to condone a stipulation such as the one made here, which is contrary to public order and expressly prohibited under the Code. Section 16(p) provides:

"16. The Board has, in relation to any proceeding before it, power

...

(p) to decide for all purposes of this Part any question that may arise in the proceeding, including, without restricting the generality of the foregoing, any question as to whether

...

(vi) a collective agreement has been entered into,

...

(viii) a collective agreement is in operation."

In this case, everyone agrees that a sale of business within the meaning of section 44 took place. We already know that we had to determine, pursuant to section 44(2)(c), which agreement would be binding on Tiger (the buyer) as being the "collective agreement ... (applicable) ... on the date on which the business is sold."

Because this is a case of intermingled work-forces following a sale of business, we also have identified, pursuant to section 45(2), which collective agreement would be "binding on the trade union determined ... to be the bargaining agent" for the unit found appropriate. We have said that the Dolphin agreement should apply. But what constitutes that agreement?

Clearly, CBRT and Dolphin did not have the right to amend the term of their 1989-95 agreement while they did have the right to amend the other provisions. One cannot deny amending the term of the agreement when it is brought down from 1995 to 1992. It is our finding that the 1989 contract was not terminated in 1992, but rather unlawfully extended beyond its initial termination date.

The question that bears asking is whether that illegal change to the term provision nullifies the whole agreement and, in particular, other authorized changes that were

approved. Our answer, in this case at least, is no. First, the Board has no statutory obligation to find otherwise and, second, it would make no labour relations sense to do so.

In Canadian Broadcasting Corporation (1986), 66 di 71 (CLRB no. 575), the Board faced a somewhat similar problem, albeit with a different background. In that case, the parties had extended the term of an expired agreement, and extended it by less than one year. That was found to be contrary to sections 67(1) and (2). The Board had determined that the understanding reached by the parties to extend an already expired contract should be characterized not as the extension of the term of the earlier agreement, but rather as a new agreement altogether. Had it found otherwise, the amendment would probably have been null. The problem was that the Code does not allow contracts of less than one year. The Board determined as a remedy to this unlawful stipulation that the new agreement's term should be deemed to be one year and not less, pursuant to section 67(1). This allowed for the preservation of the statutory rights of the employees while not being too disruptive.

In this instance, we can only surmise from their submissions that the parties indeed knew about section 67(2) but chose to try and escape it. This being so, the other changes made are nonetheless legal. What is illegal, and in our finding, null and void, is the term provision. It follows that the initial provision governing the term will remain unchanged from what it was in 1989, and therefore that the current collective agreement as amended in 1992 will remain in place but will expire as set out in 1989, i.e. on April 30, 1995. Any

provision in the agreement incompatible with our determination will need to be interpreted accordingly.

This finding means that the open periods for the purpose of certification or revocation will remain as per the 1989-95 term provision. Looking ahead, these periods will be between January and April of 1994 and 1995 and also at the commencement of its last three months of operation.

#### IV

##### Conclusion

In summary, the Board made the following determinations.

- (1) Dolphin was a federal undertaking at the time of its merger with Tiger in 1993.
- (2) Dolphin was already a federal undertaking when it signed its 1989 collective agreement with CBRT.
- (3) Dolphin's provincial certification was made obsolete when Dolphin became a federal undertaking.
- (4) CBRT, even though no longer validly certified under provincial legislation, was nonetheless a validly voluntarily recognized bargaining agent under the Code.
- (5) Tiger was and remained throughout a validly certified employer governed by the Code.
- (6) When the Group decided that Dolphin and Tiger would merge, this constituted a sale of business under section 44 of the Code.

- (7) Following that sale, there was an intermingling of employees warranting the application of section 45.
- (8) The Board determined, pursuant to section 45(1)(a), that the resulting unit appropriate for collective bargaining should comprise all drivers in British Columbia.
- (9) The Board further determined that, pursuant to section 45(1)(b), since the work-force of Dolphin was incomparably greater in number than that of Tiger, that the Dolphin bargaining agent and, by way of consequence, the Dolphin collective agreement should cover the bargaining unit resulting from the merger.
- (10) The Board further determined that the CBRT will remain certified since it had majority support in the extended bargaining unit;
- (11) In its consideration of the issue of the collective agreement applicable to the newly constituted unit, the Board determined that Dolphin and CBRT had unlawfully amended the term of their 1989-95 collective agreement contrary to section 67(2) of the Code.
- (12) The Board further determined that the amendment to the term provision was null and void and that the initial term of September 1995 had to be reinstated.
- (13) The Board declared that the other changes made in 1992-93 to the agreement were legal and that the

overall agreement had to be interpreted in a way compatible with this decision.

(14) The Board finally indicated that the open periods for the purpose of certification or revocation would be determined on the basis that CBRT has a collective agreement running from April 1989 to September 1995.

The Board directs, pursuant to section 16(g) of the Code that, within 10 days of this decision, Dolphin's management post a copy of this decision for a period of 30 days at every work location covered by the CBRT collective agreement, at the usual place where notices directed at unionized personnel are posted. The Board's regional office in Vancouver will provide Dolphin with a sufficient number of copies of this decision, if so requested.

A formal order will issue to give effect to the sale of business declaration made in these reasons.

Serge Brault

Serge Brault  
Vice-Chairman

Calvin B. Davis

Calvin B. Davis  
Member

Robert Cadieux

Robert Cadieux  
Member

ISSUED at Ottawa, this 15th day of December 1993.

CLRB/CCRT - 1043



# information

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## Summary

Canadian Union of Public Employees, Broadcast Council, complainant union, and Canadian Broadcasting Corporation, respondent employer.

Board File: 745-4050

Decision No.: 1044

The Canadian Broadcasting Corporation ceased employing a person on a casual or relief basis as a set decorator following the disclosure that he had been linked to certain alleged irregularities for which a long-time regular employee had been dismissed. This person was subsequently called as a witness by the CBC to testify in the arbitration of the grievance brought against the long-time employee's termination.

The union, the Canadian Union of Public Employees, Broadcast Council, complained to this Board that the CBC had violated various provisions of section 94 of the Canada Labour Code (Part I — Industrial Relations) in its treatment of the person in question and particularly in respect of its use of him as a witness at the arbitration.

The Board found that the evidence did not support the complaint and dismissed it.

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

## Résumé

Syndicat canadien de la Fonction publique, division de la radiodiffusion, syndicat plaignant, Société Radio-Canada, employeur intimé.

Dossier du Conseil: 745-4050

Décision n° 1044

La Société Radio-Canada a cessé d'employer un décorateur à titre occasionnel, ou à titre d'employé de relève, lorsqu'elle a appris que cette personne avait été associée à des présumées irrégularités par suite desquelles un employé permanent ayant de longues années de service avait été congédié. La Société a appelé cette personne à comparaître comme témoin lors de l'arbitrage du grief concernant le congédiement de cet employé permanent.

Le Syndicat canadien de la Fonction publique, division de la radiodiffusion, s'est plaint au Conseil que la Société avait violé un certain nombre de dispositions de l'article 94 du Code canadien du travail (Partie I — Relations du travail), en raison de la façon dont elle avait traité cette personne, plus particulièrement, du fait qu'elle l'avait appelée à comparaître devant l'arbitre.

Le Conseil a conclu que la preuve ne corroborait pas cette plainte et l'a donc rejetée.



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Relations du  
Travail

Reasons for decision

Canadian Union of Public Employees,  
Broadcast Council,

*complainant union,*

*and*

Canadian Broadcasting Corporation,  
*respondent employer.*

Board File: 745-4050

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The Board consisted of Thomas M. Eberlee, Vice-Chairman, and J. Jacques Alary and François Bastien, Members.

Appearances:

Douglas J. Wray, for the complainant union; and

John A. Coleman, for the respondent employer.

These reasons for decision were written by Thomas M. Eberlee, Vice-Chairman.

I

On October 18, 1991, the Canadian Union of Public Employees, Broadcast Council (CUPE), filed a complaint alleging a series of violations of the Canada Labour Code (Part I - Industrial Relations) by the Canadian Broadcasting Corporation (CBC) in respect of the fact that Blake Melnick had not been given further employment after approximately July 21, 1991.

More specifically, the union's complaint document sets out the allegations as follows:

*"The Complainant complains that the Respondent has interfered with the administration of the trade union or the representation of employees by a trade union.*

*The Complainant further complains that the Respondent has refused to continue to employ, laid off and otherwise discriminated against a bargaining unit employee with respect to employment because such employee has participated or may testify or otherwise participate in a proceeding under Part I of the Canada Labour Code.*

*The Complainant further complains that the Respondent has sought to compel a person to cease to be a member or representative of a trade union or to refrain from testifying or otherwise participating in a proceeding under Part I of the Code or making a disclosure that the person may be required to make in a proceeding under Part I."*

It was asserted by the union that the CBC had violated sections 94(1) and 94(3) of the Code..

A hearing was first scheduled by the Board for December 5 and 6, 1991 in Toronto. Then it was adjourned sine die at the request of the parties. Late in August 1992, the Board was advised that settlement discussions had been inconclusive and new hearing dates were requested. The parties agreed that only one day would be required; no time was available until December 9, 1992. That one day proved to be insufficient for the presentation of the parties' evidence and submissions. It was then difficult to find a second day when all concerned would be available. Eventually, October 20, 1993 was selected; the hearing was concluded on that date.

II

Blake Melnick had been employed from time to time by the CBC as a casual or relief employee engaged for specific assignments for periods of less than 100 days. He began his periodic association with the employer in 1988, as a stagehand. Later,

he was brought in for various assignments on television productions as a "set decorator". In the spring and early summer of 1991, he worked as a set decorator for an episode of "Scales of Justice", a task that was completed by the end of the first week of July 1991. He expected to work in a similar capacity on another episode of this television program which was scheduled to be made beginning in late July. He told the Board that Gérard Buèche, who was a senior in the design department, had assured him, when he accepted the first "Scales of Justice" assignment earlier in the spring, that he would be working on more episodes.

In May 1991, a senior set decorator with 37 or 38 years of service, Ed Dykas, a fellow employee of Mr. Melnick, was dismissed by the CBC. His termination was grieved by CUPE. (About one year later, in May 1992, an arbitrator, after numerous days of hearing the grievance between July 1991 and February 1992, issued an award reinstating Mr. Dykas, with full compensation.)

Whatever the CBC's allegations were against Mr. Dykas - and there is no need here to go into them - there had been around the time of his dismissal an auditor's investigation of transactions engaged in by Mr. Dykas, Mr. Melnick and others. Mr. Melnick's involvement in these transactions was apparently not extensive, but did relate, among other things, to questionable receipts that he was said to have submitted to the CBC. No specific action was taken against him at the time and he continued working until the end of the "Scales" episode.

Heidi Polowin, who had acted as the CBC's counsel for the Dykas arbitration, testified that she began preparing for the hearing and met with CBC officials on or about July 9, 1991. Mr. Melnick's name came up in the context of the auditor's report into alleged irregularities involving Mr. Dykas. Bearing in mind that Mr. Dykas had been dismissed for these alleged irregularities after 37 or 38 years of service and Mr. Melnick, who appeared also to have some involvement in associated

or related problems, was a casual with a very short and sporadic employment record, she queried what the CBC had done with him. She explained that in her mind the employer had to treat employees the same way - had to ensure that discipline was imposed "even-handedly." There might be difficulty before the arbitrator if the CBC did not act even-handedly; a negative inference might be drawn.

A labour relations officer, Josie Delpriore, was dispatched to look at Mr. Melnick's file and to check on his status. She reported back to the meeting that he was a casual or relief employee. Jean-Guy Lessard, senior corporate industrial relations officer, then instructed her to telephone Mr. Melnick's supervisor to tell him that Mr. Melnick should not be working.

She then telephoned Mr. Buèche, the supervisor, and told him Mr. Melnick should not be working because he was linked to the Dykas case. She testified that Mr. Buèche did not ask any questions and she did not volunteer any further information. Mr. Buèche did advise her that the "Scales" episode was finished, and Mr. Melnick's particular job at that time had been completed in any case. Ms. Delpriore said she did not indicate to Mr. Buèche anything about future employment possibilities for Mr. Melnick. No written notice of any kind was sent to Mr. Melnick that his services were no longer needed. According to Ms. Delpriore, no notice was required because he had finished the term for which he had been hired.

Mr. Melnick testified that he heard nothing at first about the CBC's decision flowing from the July 9, 1991 meeting. In fact, about this time, he went to California. On or about July 19, a friend telephoned him and he realized he had not been asked to take part in the next "Scales" episode. In another phone call, he was told by a CBC associate that he was no longer on the show and somebody else was taking his place. He then got in touch on July 21 with Mr. Buèche.

He told the Board that Mr. Buèche said he was not being accused of doing anything wrong and there was nothing wrong with his work. It was simply that counsel had advised that while the arbitration was ongoing, it would be best that he not work for the CBC. He testified that Mr. Buèche told him there would be plenty of work for him in the fall once the arbitration was over.

Mr. Melnick was subpoenaed by the CBC to be a witness at the Dykas arbitration. He was present on the first day of the hearing, on July 23, 1991. Ms. Polowin interviewed him about the transactions involving the questionable receipts that have been mentioned on page 3 of these reasons. There was no discussion of his employment status - or lack thereof - at the CBC.

Ms. Polowin testified that she was not sure initially whether she would actually put Mr. Melnick on the witness stand. She always subpoenas union employees when she wants to talk to them. In reviewing the case against Mr. Dykas, she had concluded that she needed to hear directly from Mr. Melnick about the transactions in which he had been involved. Only as the case progressed would she decide whether he would actually be placed in the witness stand to testify.

Mr. Melnick telephoned Ms. Polowin early in September 1991, to seek confirmation of what Mr. Buèche had told him - that on the recommendation of legal counsel, he was not going to be employed while the arbitration was under way. Ms. Polowin did not give him an answer that satisfied him; she suggested he call the CBC. He telephoned her again on September 17 and she repeated that he should call the labour relations people at the CBC.

Mr. Melnick's response was to complain to the union, which filed this complaint on October 18, 1991.

A week or so later, Mr. Melnick was called under the terms of the subpoena to testify formally at the arbitration hearing. Ms. Polowin explained that as the case progressed his testimony had become necessary for the employer's case. The CBC's position was that there were two "fake receipts" and that Mr. Melnick had been involved in their preparation. She needed Mr. Melnick to testify that the receipts were in fact fake. He did so.

### III

The advice that Ms. Polowin gave the CBC concerning the inadvisability of a casual employee, who had been linked to alleged irregularities, being kept in employment while a 37- or 38-year veteran, full-time employee was terminated in connection with these and other alleged irregularities, does not strike the Board as being at all unreasonable. Almost certainly an arbitrator would have, at the very least, raised an eyebrow in surprise over such a juxtaposition and might well have drawn an inference unfavourable to the employer's case for dismissal of the one employee. Such advice, and its implementation by the CBC, cannot be seen by the Board as anything more than a rational effort by counsel and an employer to close up any possible loophole that might enable the other side to gain advantage at arbitration. In the Board's view this was quite legitimate and in no sense did the CBC's action violate the Code.

Mr. Melnick's particular assignment had ended. The CBC's implementation of counsel's advice actually required nothing more than a decision not to re-employ him. It is possible, although far from probable, that had the CBC been more forthcoming about its attitude toward him, had it written him or telephoned him (instead of being so excessively mysterious and leaving it to him to try to dig up a reason for his not being employed on the subsequent "Scales" episode), this complaint would not have been filed. On the other hand, this could have been one

of those situations where, because of the casual or relief nature of the employment of Mr. Melnick, and because his specific period of employment had been completed, the CBC determined that the less said the better - leaving Mr. Melnick to draw his own conclusions, which in the Board's opinion, turned out not to be warranted by the facts.

The CBC did feel that it needed Mr. Melnick to be a witness at the Dykas arbitration, so it subpoenaed him. The theory was advanced to us that the CBC treated Mr. Melnick in the way it did because it sought to influence his testimony to its advantage. Among other things, the CBC was said to have done so through the telephone conversation Mr. Melnick had with Mr. Buèche two or three days before the arbitration began when he called Mr. Buèche to find out why he had not been asked to work on the next episode of "Scales"; Mr. Buèche was said to have explained his understanding of the situation but to have assured Mr. Melnick that there would be work for him later on, the hint being - according to this theory - that he would get work if he testified appropriately.

The trouble with this theory is that it is simply too far-fetched to be credible. In the first place, nothing in the evidence pointed to anything illegitimate in the CBC's decision not to employ Mr. Melnick for the next episode of "Scales". The reason given for this move makes sense, as we have suggested earlier, and provides no indication of any actual, intended or even accidental violation of the Code.

There is nothing illegitimate in Mr. Melnick then being called to testify for the CBC as to the circumstances of his involvement in the alleged irregularities that were said to be related to the CBC's case against Mr. Dykas. Nor does the evidence indicate anything illegitimate in this.

As to whether the CBC through all of this sought to influence Mr. Melnick's

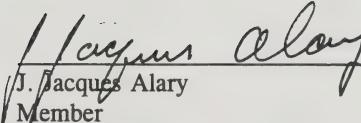
testimony, particularly via Mr. Buèche, it must be remembered that Mr. Melnick called Mr. Buèche. The evidence shows that the latter had simply been told not to employ Mr. Melnick again. He had not been told precisely why, although he understood it was linked to the Dykas case. Nor had he been commissioned to pass any message on to Mr. Melnick. In response to Mr. Melnick's enquiry, he explained what he understood or assumed was the reason. Then he went on, without any authority from the CBC to do so, to assure Mr. Melnick that there would be work for him later on. This was his own idea. Moreover, there is no evidence that he had any knowledge Mr. Melnick would be a witness when this conversation took place.

The evidence shows quite clearly and directly that what the CBC wanted from Mr. Melnick as a witness at the arbitration hearing was simply his version of the truth. The CBC was already aware of this from an interview a member of management had had with him in May concerning his part in the alleged irregularities. Mr. Melnick repeated this information to the CBC's counsel at her interview with him on the opening day of the arbitration, after he had been subpoenaed. There is no suggestion that the CBC attempted to get him to change his story on the witness stand. And there is no evidence of any kind, including what may be inferred from the arbitrator's award, that Mr. Melnick presented anything but the truth. It may well be that there was an "atmosphere of influence", upheld if not created by the CBC, which constrained Mr. Melnick to tell the truth, rather than to lie, on the witness stand. But this is not the kind of improper influence outlawed by the Code.

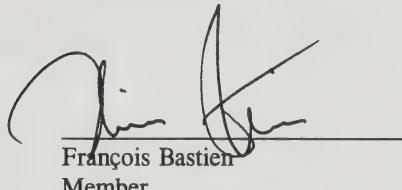
There is nothing in the evidence which supports the complaint. It is therefore dismissed.



Thomas M. Eberlee  
Vice-Chairman



J. Jacques Alary  
Member



François Bastien  
Member

ISSUED at Ottawa, this 17th day of December 1993.

CLRB/CCRT - 1044



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# information

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## Summary

Donna Weir, complainant, supported by Canadian Union of Postal Workers, and Canada Post Corporation, respondent.

Board File: 745-4151

Decision No.: 1045

The Board found that Canada Post Corporation, in laying off and transferring, and then ultimately refusing to continue employing a person as a casual short-term employee violated various parts of section 94 of the Canada Labour Code (Part I — Industrial Relations).

The Board ordered Canada Post Corporation to take back the person into employment and to give her indeterminate or regular status and to compensate her for lost earnings.

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

## Résumé

Donna Weir, plaignante, appuyée par le Syndicat des postiers du Canada, et la Société canadienne des postes, intimée.

Dossier du Conseil: 745-4151

Décision n° 1045

Le Conseil a jugé que la Société canadienne des postes a enfreint diverses dispositions de l'article 94 du Code canadien du travail (Partie I — Relations du travail) lorsqu'elle a mis à pied, muté et enfin refusé de réembaucher une employée occasionnelle, embauchée à court terme.

Le Conseil a ordonné à la Société canadienne des postes de reprendre à son service l'employée en question, de lui donner le statut d'employé permanent et de la dédommager pour toute perte de salaire.



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LES MOTIFS DE DÉCISION DU CCRT SONT  
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Labour  
Relations  
Board  
  
Conseil  
Canadien des  
Relations du  
Travail

Reasons for decision

Donna Weir,  
*complainant,*  
*supported by*

Canadian Union of  
Postal Workers,

*and*

Canada Post Corporation,  
*respondent.*

Board File: 745-4151

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The Board consisted of Thomas M. Eberlee, Vice-Chairman, and J. Jacques Alary and François Bastien, Members.

Appearances:

David Bloom, for the complainant; and

Brian P. Smeenk, for the respondent employer.

These reasons for decision were written by Thomas M. Eberlee, Vice-Chairman.

I

Donna Weir filed a complaint with the Board on December 30, 1991 alleging that Canada Post Corporation (Canada Post) had dismissed her on or about October 1, 1991, contrary to the Canada Labour Code (Part I - Industrial Relations) because she had "participated in a strike that was not prohibited by the Canada Labour Code." In the complaint, she asserted that she "was also told by my Employer that I should not have gone to the Union, and that I did not have a right to file a grievance." By

the time the matter was scheduled for a hearing by the Board, later in 1992, the particulars had been extensively detailed and the Canadian Union of Postal Workers (CUPW) had formally got involved to assist Ms. Weir. In a letter to the Board, dated October 27, 1992, counsel for Ms. Weir and CUPW, summarized the gist of the complaint as follows:

*"... it will be the position of the Complainant that the Respondent Canada Post Corporation has violated Sections 94(1); 94(3)(a)(i); 94(3)(a)(vi); 94(3)(b) and 94(3)(e) by*

*(1) laying off Ms. Weir from her position at the Galt Post Office on or about September 1991, and by subsequently re-assigning her to transportation in Kitchener;*

*(2) by failing to continue Ms. Weir in employment after November 9, 1991 and by effectively dismissing her from her employment at Canada Post Corporation."*

It was on the basis of the foregoing that the hearing proceeded in Toronto on November 2, 3 and 4, 1992, and February 9, 10, 11 and 12, May 5 and 6, July 6 and 7, and September 27, 1993.

The provisions of the Code alleged to have been breached read as follows:

*"94. (1) No employer or person acting on behalf of an employer shall*

*(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; or*

*(b) contribute financial or other support to a trade union.*

...

*(3) No employer or person acting on behalf of an employer shall*

*(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person*

(i) *is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,*

...

(vi) *has participated in a strike that is not prohibited by this Part or exercised any right under this Part;*

(b) *impose any condition in a contract of employment that restrains, or has the effect of restraining, an employee from exercising any right conferred on him by this Part;*

...

(e) *seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a financial or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of a trade union or to refrain from*

(i) *testifying or otherwise participating in a proceeding under this Part,*

(ii) *making a disclosure that the person may be required to make in a proceeding under this Part, or*

(iii) *making an application or filing a complaint under this Part;"*

## II

Donna Weir worked as a short-term, casual letter carrier in the Galt post office, on a virtually full-time basis, from November, 1990 until September 30, 1991. By "short-term", it is meant that she was employed by Canada Post under a series of contracts of less than 20 days' duration each. When one contract expired, another one took over immediately, hence the full-time nature of her supposedly "short-term" employment. As a casual, she was employed to fill in when regular, so-called indeterminate employees were not available for their usual employment. A person who is taken on as a casual usually enjoys fairly full-time employment and, if his or her work is satisfactory, and if she or he stays around long enough, almost always becomes a long-term casual and may ultimately achieve regular status with Canada Post.

As we suggested earlier, Ms. Weir had worked almost continuously in various letter carrier capacities until the end of September 1991. On August 26 and September 5, 1991, members of the CUPW bargaining unit engaged in rotating strike activity at Galt. Ms. Weir walked the picket line on both occasions. CUPW's local president, John Vandonk, testified that so far as he was aware she was the only short-terminer who actually picketed. While there were some denials by witnesses called by Canada Post, the Board is convinced that Ms. Weir's supervisors were aware of her picketing activities. In fact, on the Saturday between August 26 and September 5, she and her friend, Michael Birch, responded to a request by a Galt supervisor for volunteers to deliver pension cheques. Ms. Weir and Mr. Birch covered several letter carrier "walks" that day and travelled their rounds by bicycle. The result was that their efforts were written up in the Galt daily newspaper, and their connection with the union and the strike situation was identified quite publicly. The article was illustrated with a picture of them. The Board has no reason to doubt Ms. Weir's testimony that a clipping of the article was on a bulletin board near the spot where employees clock in when she arrived at work on September 3. Furthermore, she testified that supervisor Nelson Granger came out of the post office on September 5 while she was picketing and handed her an envelope containing pay for the special Saturday work. The foregoing explains in part why the Board believes that her supervisors knew she was supporting CUPW's picket line and other activities during this period.

Canada Post sought to convince the Board that there was no connection between Ms. Weir supporting the union during the rotating strikes and her subsequent fate. It was claimed that a fellow short-time casual at Galt, Larry Good, was also seen on the picket line and thus there was nothing out of the ordinary about her activity. Mr. Good did not testify personally as to his participation or otherwise. The Board prefers the evidence of the picket captain, Brian Lansdowne, and others that Mr. Good did not in fact picket.

The employer also advanced the proposition that Jim Nispel, then a short-terminer like Ms. Weir, picketed as well, and his subsequent employment was unaffected by this activity. Thus, in the view of Canada Post, it could not properly be claimed that picketing had anything to do with Ms. Weir's lay-off since it did not affect Mr. Nispel's employment. It turned out, however, that Mr. Nispel had been a close friend of Canada Post staffing officer Robert Cameron since high school days and that his picketing was actually prompted by Mr. Cameron. Mr. Nispel testified that he telephoned Mr. Cameron prior to August 26 and asked him what he should do if he were requested to picket. Mr. Cameron replied: "You have to work with these guys; go picket with them." Mr. Nispel has since been the recipient of at least one favour from Mr. Cameron: he was given a three-month leave of absence from Canada Post so he could hold down a full-time job elsewhere; he has also been propelled rather quickly up through the ranks and now holds a supervisory job. On balance, the Board does not consider that Mr. Cameron's pragmatic advice to his close friend, Mr. Nispel, represents the real view of Canada Post's local management toward short-terminers like Ms. Weir who supported CUPW's rotating strike efforts. Indeed, there was evidence that several other short-term casuals who had participated in strike activity were briefly laid off like Ms. Weir after September 30, 1991. The corporation's explanations for these lay-offs, albeit very cursory, since they were not the subjects of complaint, were, as it turned out, no more clear and convincing than was the explanation for Ms. Weir's lay-off.

Ms. Weir told the Board that early in September 1991, she heard that regular employees were being offered a position known as "senior letter carrier" (SLC) - a posting in which the incumbent relieved any absent letter carrier. Apparently nobody who was entitled to bid on the job first was interested. Finally, on September 27 (a Friday), the job was offered to her. She accepted. On Monday, September 30, she acted in the S.L.C. capacity.

Upon her return to the post office that day at the conclusion of her delivery of mail as an S.L.C., she was told by supervisor Granger that she was being laid off immediately for two weeks and that she would then be working in the transportation department in Kitchener. This is the unit that delivers parcels, empties street letter boxes, brings bags of mail to letter carriers and handles courier services. For various reasons, a transportation department job is considered to be less desirable than the kind of work Ms. Weir had been doing up until then. She told the Board that Mr. Granger said he did not know why she was being laid off and re-assigned. He told her that he was acting on the instructions of staffing officer Cameron; if she wanted a reason, she would have to talk to Mr. Cameron.

Staffing officer Cameron conceded in his testimony that transportation was a less desirable assignment than that of a letter carrier. He and other Canada Post managers gave various reasons for moving Ms. Weir; as each reason was closely examined, it turned out to be without validity. In the end, this was virtually admitted by management witnesses. In essence, the Board is faced with the fact that no credible rationale was advanced by the employer for its behaviour toward Ms. Weir.

One excuse given was that management had agreed to shift two regular, part-time employees from transportation into letter carrier work in Galt as of the week in which she was laid off so that they could obtain longer hours. It transpired, however, that no such shift took place at that time. For example, Hugh McConville, manager of collection and delivery for the area - and staffing officer Cameron's boss - told the Board in examination-in-chief that one such regular employee (known as an MSC) was moved into a position Ms. Weir was covering; this led to her lay-off. Mr. Cameron offered much the same explanation. But later on Mr. Cameron, at least, retracted this explanation. The evidence before the Board demonstrates conclusively that this story is simply not true.

There was some confusion in the testimony concerning the time when Ms. Weir was first advised that she would be going to transportation. Ms. Weir was certain that the first word she had about this was on September 30, coupled with the announcement of the lay-off, after she had accepted the S.L.C. assignment and done that work for one day -- in other words, during the conversation with Mr. Granger, when she was advised she was being laid off and would later be going to transportation. Mr. Cameron, and other Canada Post managers and/or supervisors, were equally certain that she had been told on Thursday, September 26 or Friday, September 27 that she would be going to transportation on September 30 -- in other words, that no period of lay-off was planned for her.

According to Mr. Cameron and other Canada Post witnesses, Ms. Weir was upset about being transferred to transportation and tried to have the managers' decision changed. Mr. Cameron testified that Ms. Weir called him on September 26 to ask why she was being displaced as a letter carrier; she argued that she should have stayed at a letter carrier job in Galt because she had more seniority than another casual, Larry Good, (whose participation or non-participation in picketing is referred to on page 4 of these reasons). Mr. Cameron told the Board that he reminded her she had no rights under the collective agreement and could be assigned or reassigned by the employer at will, regardless of her "seniority". He testified that he knew on or about September 27 - that is, before she was laid off on September 30 - that Ms. Weir had raised with CUPW the issue of the proposed transfer to transportation. Moreover, he recalled that on September 26 or 27, John Vandonk, the local president of CUPW, telephoned him to discuss the matter. (Mr. Vandonk's recollection was that his first conversation with Mr. Cameron regarding Ms. Weir took place after September 30.) The foregoing discrepancies in the parties' recollections do not, in the Board's view, raise questions of credibility. If anything, they tend to operate to the complainant's advantage. We shall have more to say about this later.

In any event, according to the employer's version, the original intention was to send Ms. Weir to transportation on September 30. Why the employer intended to do that is, as we have suggested earlier, largely without a credible rationale. Then - according to the employer's own evidence - after Ms. Weir had complained, had invoked the name of the union, and had had the local president raise the matter on her behalf - she was suddenly given the S.L.C. assignment for one day and then laid off for two weeks. This lay-off, too, was the subject of several attempts at explanation, none of which stood up to careful examination.

Following the lay-off, Ms. Weir was instructed to report to the transportation department on October 15. Her unhappiness at what she perceived as unfair treatment, in the light of her lengthy and satisfactory employment history in various letter carrier capacities (which was acknowledged by the employer), was expressed to several supervisors, including the supervisor of the transportation department, Paul Brinklow. She made no secret of the fact that she had complained to the union about this treatment and was contemplating filing a grievance concerning the re-assignment. According to the testimony of Mr. Cameron and other supervisors, they were well aware even prior to her being employed in the transportation department on October 15, 1991 that she was thinking and talking about trying to use the union and the grievance procedure to undo the perceived unfairness.

The evidence shows that Ms. Weir's actual work in the transportation department was satisfactory. Mr. Brinklow himself testified that this was the view of her direct supervisors. He knew nothing that would contradict this. There were, however, two or three incidents, which do not need to be detailed here, that supervisor Brinklow mentioned in testimony to support his view that he preferred not to have Ms. Weir continue in the transportation department. In the final analysis, the employer's decision not to renew her contract and thus not to continue employing her after November 9, 1991 was, according to the testimony of Messrs. McConville,

Cameron and Brinklow, based on the following.

- Ms. Weir didn't really want to work in transportation; (but she did work there).
- She didn't really want to work Saturdays; (but she did work Saturdays).
- She had "a poor attitude".
- She had demanded certain information: that is, a copy of what she took to be a seniority list of short-term casuals so she could use it in arguing against her lay-off and transfer.
- She felt she had the right to grieve in respect of "job ownership" in Galt.
- She tended to ask a lot of questions; (on this score, the Board's reaction is that she demonstrated a quick and enquiring mind by asking supervisors why Canada Post did certain things in certain ways and that this was symptomatic of value in an employee rather than of anything of a negative character).

Mr. McConville told the Board that all of this added up to her being a potential poor employee. So they decided to let her go.

The truth as to why they let her go is different, however, and it comes directly out of the mouth of the person in the management of the Kitchener-Cambridge post office operation who was responsible for staffing - Mr. Cameron. He agreed during cross-examination that a document (Exhibit 31), which had been filed by Ms. Weir in support of this complaint, was an accurate transcript of two telephone conversations he had had with her on November 21, 1991. Among many other things, Mr. Cameron said to Ms. Weir:

*"... I'm not disputing your doing a good job ... All I'm getting is feedback from people like transportation that you have a bad attitude  
..."*

*... You have no right to grieve ...*

*... You were a term employee: you have to show your interest in the job and you can't complain and go around threatening to put in grievances ...*

*... Donna you were laid off -- Donna not because we had no more work for you but because we were going through and finding what the problem was. O.K. I went through and determined all the cause I had to know. You weren't coming to us. O.K. You were going to the union. O.K. We had John Vandonk, I have Steve Clark were calling me they put a grievance in on your behalf. You weren't dealing with us...*

*... O.K. Well I'm telling you that uh you know you talked about a grievance procedure, you were dealing with the union, you came to me once and asked me why, I explained to you and you went to the grievance procedure at that point in time. You don't even have rights to.*

*To this, Ms. Weir asked: So are you saying you're punishing me for doing this?*

*Mr. Cameron's reply was: No I'm not punishing you for doing that, what I'm telling you is that we're not bringing you back into-into-uh - Canada Post.*

*Toward the end of the first conversation, Mr. Cameron said: We're disputing your attitude. A term employee does not have an attitude like you have.*

*[sic]"*

### III

As we indicated earlier, the conversation appears to have been lengthy, for the transcript itself is lengthy. Much more was said than we have quoted; we do not, however, believe that the extracts we have cited are taken out of context. It is clear from them that, in the final analysis, Canada Post management did not continue to employ Ms. Weir for the reason that she invoked the assistance of the union and talked about asserting what she thought might be her rights under the collective agreement by way of filing a grievance.

What of the initial treatment - the lay-off for almost two weeks on September 30, 1991 and the subsequent transfer to the transportation department, a less desirable work assignment. There is no credible explanation for what Canada Post did to

Ms. Weir. In the final analysis, the employer has failed to discharge the burden of proof imposed on it by section 98(4) of the Code:

*"98. (4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party."*

The evidentiary picture, taken as a whole, leads the Board to conclude on a balance of probabilities that Canada Post's treatment then of Ms. Weir was intended, in part at least, to be a message to her, as a casual, not be to too closely involved with the union and its activities and as a rap on the knuckles for supporting CUPW's rotating strike more actively than other casuals. On this basis, the Board finds that Canada Post violated section 94(3)(a)(vi) of the Code:

*"94. (3) No employer or person acting on behalf of an employer shall*

*(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person*

...

*(vi) has participated in a strike that is not prohibited by this Part or exercised any right under this Part;"*

We have somewhat more of a problem in determining whether other provisions of the Code were violated by Canada Post at this time. Ms. Weir and other employees testified that she had not talked to any supervisors prior to September 30 about, and made them aware that she might be enlisting the union's help to fight a transfer to transportation that was slated at first to occur on September 30 with no intervening lay-off. On the other hand, Mr. Cameron and several of her supervisors testified

that they were aware from conversations with her and the local union president on September 26 or 27 that she had brought the union into the picture. (Please see page 7 of these reasons). Let us assume that Ms. Weir's memory here is incorrect. Let us assume that the Canada Post witnesses are correct. The Board must then conclude that the lay-off itself came up suddenly, in addition to the already planned transfer to transportation, and that Ms. Weir was given extra punishment for having had the temerity to draw the union into the issue of the proposed transfer to transportation - which was itself punishment for supporting the rotating strike.

The November 21 conversation confirms that management's basic reason for finally getting rid of Ms. Weir as of November 9, 1991 was because she had gone to the union, had talked about grieving and had ultimately filed a grievance, although this last action occurred after November 9. If the local management felt this way about Ms. Weir's conduct in November, no doubt it felt the same way about that sort of activity in September. That Canada Post, at least in the Kitchener-Cambridge area, had as an on-going policy a zero-tolerance level for term-employee involvement vis-à-vis the union is apparent from the general evidentiary picture. More particularly, it was confirmed by way of Exhibit 61 where both Ms. Weir and Mr. Birch quote supervisor Jim Richardson as having said to them: "I know management gets worried and nervous when terms talk union." This evidence was not contradicted. Thus, it is not unreasonable to infer that the same management attitude which brought about her departure from Canada Post after November 9, 1991 was at work in respect of the lay-off on September 30 - that the latter was a lay-off designed to intimidate, threaten or otherwise discipline Ms. Weir because she invoked her right to be assisted by the union in fighting what she felt was unfair treatment by the employer. The employer thus violated section 94(3)(a)(i) of the Code.

Canada Post's decision not to employ Ms. Weir after November 9, 1991 has been explained in the words of Mr. Cameron. The employer, by acting on this basis, also

violated sections 94(3)(a)(i) and 94(3)(e) of the Code.

#### IV

But for the foregoing violations of the Code by the employer, the Board is satisfied that by this time, that is, the date of this decision, Ms. Weir would have worked her way into longer-term status, then indeterminate or regular status and would have completed any probationary period applying in respect of the latter status. This view of her probable career progression since September 1991, is not at all far-fetched in the light of the undisputed fact that she was a good and competent employee, according to all of the supervisors who were actually familiar with her work. This view is also confirmed in our minds by the fact that persons who signed on as short-termers in the same time period as she have themselves now progressed to indeterminate or regular status.

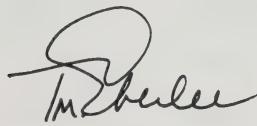
The employer's violation of the Code must be appropriately remedied. Under section 99, the Board has the power to prescribe such a remedy. Here, the basic principle that must underlie an appropriate remedy is that the victim of the employer's violation of the Code should be "made whole". Thus, Ms. Weir must be reinstated, but at the level and in the status she would otherwise have achieved. Her financial loss since September 1991 must also be made up to her by the employer.

The Board orders Canada Post Corporation to:

1. reinstate Ms. Weir as an indeterminate or regular letter carrier employee in the Galt post office forthwith;
2. compensate Ms. Weir within 30 days of the date of this decision as follows:
  - (a) between September 30, 1991 and December 31, 1991 as a short-term, full-time casual on the same hourly basis as she was compensated in the three months preceding the end of September 1991, but of course at the pay rate then applicable;
  - (b) between January 1, 1992 and December 31, 1992 as a long-term, full-time casual with no breaks in her employment; and
  - (c) after December 31, 1992, up to the present, as a full-time indeterminate or regular employee;
3. pay interest on the foregoing sums of compensation calculated on the basis of the "rough and ready" formula set forth in Samuel John Snively (1985), 62 di 112; and 12 CLRBR (NS) 97 (CLRB no. 527) and Larose-Paquette Autobus Inc. (1992), 87 di 139; and 92 CLLC 16,064 (CLRB no. 924).

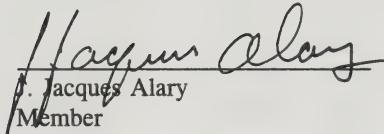
The Board appoints Peter Suchanek, regional director for Ontario, or a person designated by him, to assist the parties in implementing these orders.

The Board will remain seized of these matters so as to be able to deal with any problems that may arise or to issue a formal order should such become necessary.



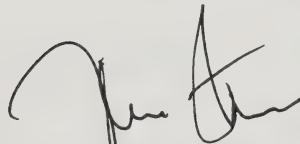
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Thomas M. Eberlee  
Vice-Chairman



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Jacques Alary  
Member



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François Bastien  
Member

ISSUED at Ottawa, this 17<sup>th</sup> day of December 1993.

CLRB/CCRT - 1045



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## SUMMARY

Canadian Brotherhood of Railway Transport and General Workers, applicant, and Reimer Express Lines Ltd., respondent.

Board File: 555-3584

Decision no. 1046



These reasons deal with the timeliness of an application for certification filed by the Canadian Brotherhood of Railway, Transport and General Workers on April 30, 1993. This issue involves the determination of whether a collective agreement was in effect at the time of the application for certification.

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The CBRT & GW is a voluntarily recognized bargaining agent which has concluded a collective agreement with Reimer Express Lines Ltd. The agreement contains an automatic renewal clause which stipulates that the agreement shall continue from year to year after March 31, 1993, unless written notice to bargain is given to the other party at least 90 days before the termination date.

The CBRT & GW served on the employer a notice to bargain on March 19, 1993, 12 days before the termination date. Although that notice was not served in accordance with the time-limits set out in the collective agreement, it does comply with section 49 of the Code. The Board held that parties cannot override the provisions of section 49 of the Code and consequently concluded that the notice to bargain had the effect of terminating the collective agreement on March 31, 1993, so that the present application was timely. The application for certification was granted.

## RÉSUMÉ

Fraternité canadienne des cheminots, employés des transports et autres, syndicat requérant, et Reimer Express Lines Ltd., employeur

Dossier: 555-3584

Decision no. 1046

Ces motifs traitent de la question à savoir si la demande d'accréditation de la Fraternité canadienne des cheminots, employés des transports et autres, datée du 30 avril 1993, a été présentée dans les délais prescrits. Il s'agit de déterminer si une convention collective était en vigueur au moment où la demande a été présentée.

Le syndicat est un agent négociateur reconnu volontairement qui a conclu une convention collective avec Reimer Express Lines Ltd. La convention renferme une clause de renouvellement automatique aux termes de laquelle la convention demeure en vigueur d'année en année, après le 31 mars 1993, à moins qu'un avis de négocier ne soit signifié par écrit à l'une des parties au moins 90 jours avant la date d'expiration prévue.

Le syndicat a signifié un avis de négocier à l'employeur le 19 mars 1993, soit 12 jours avant la date d'expiration prévue. Bien que ce délai ne soit pas celui que prévoit la convention collective, il est néanmoins conforme aux dispositions de l'article 49 du Code. Le Conseil a conclu que les parties ne peuvent pas passer outre aux dispositions de l'article 49 du Code et que par conséquent, l'avis de négocier avait eu pour effet de mettre fin à la convention collective le 31 mars 1993; la demande a donc été présentée dans les délais prescrits. La demande d'accréditation est accueillie.

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Reasons for decision

Canadian Brotherhood of Railway, Transport and General Workers  
applicant,  
and  
Reimer Express Lines Ltd.  
respondent,

Board File: 555-3584

The Board was composed of Mr. J.F.W. Weatherill, Chairman, and Messrs. Michael Eayrs and Patrick H. Shafer, Members.

Appearances (on record)

Mr. D. Olszewski, for the applicant; and  
Mr. J.D. Cockburn, for the respondent.

These reasons for decision were written by Mr. J.F.W. Weatherill, Chairman.

I

On December 15, 1993, the Board certified the Canadian Brotherhood of Railway, Transport and General Workers to represent the following group of employees:

"all owner operators and lease operators engaged in line haul operations employed by Reimer Express Lines Ltd., excluding terminal employees and P & D drivers".

In a letter attached to the certification order, the Board advised the parties that reasons for decision on the issue of timeliness of the application would follow. The following are our reasons for concluding that the application was timely.

The Canadian Brotherhood of Railway, Transport and General Workers (hereinafter "the union") is a voluntarily recognized bargaining agent which has concluded a collective agreement with respect to the owner operators and lease operators of Reimer Express Lines (Western) Ltd. (hereinafter "the employer"). This agreement contains the following automatic renewal clause:

*"16. This Agreement shall be binding on the parties hereto, their administrators, executor and assigns and shall remain in full force and effect from April 1st, 1989 to March 31st, 1993 and shall continue from year to year thereafter unless written notice to amend, cancel, or terminate the Agreement is served by either party on the other at least ninety (90) days before the termination date."*

On March 19, 1993, the union hand delivered its proposals for a new collective agreement to the employer. In response to that proposal, the employer advised the union on March 23, 1993 that the collective agreement should remain in effect without amendment.

The union filed an application for certification with the Board on April 30, 1993, seeking to represent "all Owner Operators and Lease Operators employed by Reimer Express Lines Ltd., except terminal employees and P and D drivers". In its response to the application, the employer took the position that the union had not served notice to bargain in compliance with paragraph 16 of the collective agreement, and that the application was untimely, since a collective agreement was in effect on April 30, 1993.

II

Section 24(2) of the Canada Labour Code establishes the time limits for filing an application for certification:

"24. (2) Subject to subsection (3), an application by a trade union for certification as the bargaining agent for a unit may be made

(a) where no collective agreement applicable to the unit is in force and no trade union has been certified under this Part as the bargaining agent for the unit, at any time;

(b) where no collective agreement applicable to the unit is in force but a trade union has been certified under this Part as the bargaining agent for the unit, after the expiration of twelve months from the date of that certification or, with the consent of the Board, at any earlier time;

(c) where a collective agreement applicable to the unit is in force and is for a term of not more than three years, only after the commencement of the last three months of its operation; and

(d) where a collective agreement applicable to the unit is in force and is for a term of more than three years, only after the commencement of the thirty-fourth month of its operation and before the commencement of the thirty-seventh month of its operation and, thereafter, only

(i) during the three month period immediately preceding the end of each year that the collective agreement continues to operate after the third year of its operation, and

(ii) after the commencement of the last three months of its operation."

To determine whether or not the application for certification is timely, we must first determine whether a collective agreement was in effect at the date the application for certification (section 16(p)(viii) of the Code). In order to make that determination, the Board must examine the impact of the automatic renewal clause contained in the collective agreement (paragraph 16). More particularly, it must determine whether the notice to bargain was served in a timely fashion by the union on the employer and whether such notice terminated the collective agreement on the date specified in the agreement, that is on March 31st, 1993.

Section 49 of the Code sets out the time frame for serving the notice to bargain:

"49. (1) Either party to a collective agreement may, within the period of three months immediately preceding the date of expiration of the term of the collective agreement, or within such longer period as may be provided for in the collective agreement, by notice, require the other party to the collective agreement to commence collective bargaining for the purpose of renewing or revising the collective agreement or entering into a new collective agreement."

(Emphasis added)

Paragraph 16 of the collective agreement (the "automatic renewal clause") conflicts with section 49 of the Code as it requires that notice to bargain be served on the other party **"at least ninety days before the termination date"**.

The union's notice to the employer indicating its intention to bargain for a new collective agreement was served on March 19, 1993, that is 12 days before the expiration date of March 31, 1993. This is not in compliance with paragraph 16 of the collective agreement. However, the union's notice was served within the time contemplated by section 49 of the Code.

The employer's position that a notice served outside the time prescribed in the collective agreement is invalid amounts to saying that paragraph 16 of the collective agreement supersedes section 49 of the Code and thus precludes a party from serving notice within the time limits prescribed by the Code. The Board rejects that argument.

The Supreme Court of Canada commented on the interrelation between an automatic renewal clause contained in a collective agreement and the Ontario Labour Relations Act in Bradburn v. Wentworth Arms Hotel, [1979] 1 S.C.R. 846:

"There are serious consequences for the

participants in the field of labour relations were a court to construe the provisions of The Labour Relations Act and the collective agreement in such circumstances as now before us, in such a way as to cause the establishment of a perpetual collective agreement terminable only on the execution of a new collective agreement by the parties. Where not barred by the statute the parties of course can, by unambiguous language, bring about results which others might consider to be improvident. In such circumstances the courts may not properly interfere. The scheme of labour relations under the Ontario Act is founded upon collective bargaining leading to a collective agreement and thereafter to replacement agreements. Collective bargaining in turn is an activity in which the parties participate in the full realization of their respective economic positions and strengths subject only to the limitations and boundaries imposed on the parties by The Labour Relations Act. Consequently, collective agreements, which are of course creatures of statute finding both their origin and their extent within the Act, reflect these realities. A court therefore should not be quick to place a meaning on a term of a collective agreement which would put that clause in conflict with the general philosophy of labour relations as established under the applicable statute. Such should be the case only where the contract by its clearest intent and provisions dictates otherwise. I do not find such to be the case here."

(pages 858-859; emphasis added)

According to Section 49 of the Code, the notice to bargain period is the three month period preceding the expiration date of the collective agreement or such longer period as may be provided in the collective agreement. The word "or", disjunctive in this context, allows parties to serve notice to bargain in compliance with the Code or in compliance with the collective agreement to the extent that the collective agreement may provide for a longer period than that set out in the statute. The period agreed upon by the parties must not exclude the 90 day period provided by the Code. The statutory right of parties to commence the bargaining cycle contained in section 49 may be extended by the parties but cannot be changed, avoided or abridged. To permit otherwise would be to permit the parties to

"contract out" of the provisions of the Code.

The Board agrees with the following statement of the Alberta Labour Relations Board with respect to a similar provision:

"We note particularly that s. 73(2) reads "either party to the collective agreement may, not less than 30 days and not more than 90 days preceding the expiry of the term of the collective agreement or within any longer period that may be provided for in the collective agreement, ...". In our view any contract has this minimum 30-90 day notice provision impressed upon it by force of statute. The contract may extend the period but it cannot truncate it. Once a notice is given within the time frame in s. 73(2) it has the same effect as a notice to bargain given in the contractual time frame if such a time frame is set out and if, as in this case, that period is not coincident with the statutory period."

(Edmonton Co-operative Association, (1985) A.L.R.B. 85-074, at page 17; emphasis added)

The Ontario Labour Relations Board expressed the same view in Otto's Deli, [1980] OLRB Rep. Nov. 1673 in the context of an application for termination of the union's bargaining rights:

"10. The scheme of the Act envisages the periodic renegotiation of collective agreements and a right to resort to conciliation which is triggered by a notice within the period prescribed by section 45. In view of the simple language and purpose of section 45, it would be surprising in our view if a notice properly given within the prescribed (sic) time limit did not bring the subsisting agreement to an end and crystalize (sic) the right to resort to conciliation. Where the Legislature has envisaged that parties could "contract out" of a statutory provision, it has used very clear and specific language (see for example, section 37(5a)). No such language appears in section 45, and we do not think the Board should readily conclude that its provisions can be bypassed."

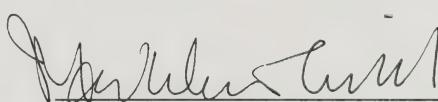
(page 1676; see also Marshall Auto Wreckers, [1990] A.L.R.B.R. 241; Bradon Construction Ltd., [1989] A.L.R.B.R. 268; Sheet Metal Contractors Association of Alberta, [1988] A.L.R.B.R. 326; Danver Ambulance Service Inc., [1985] OLRB Rep. June 833; Utah Co. of Americas, 59 CLLC 15,460 (Sask. C.A.))

III

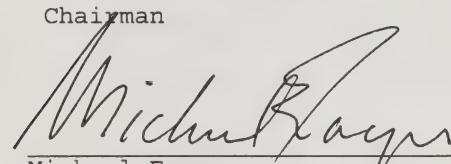
Although the notice to bargain was not served in accordance with paragraph 16 (the "duration clause") of the collective agreement, it nevertheless does comply with section 49 of the Code.

Since parties cannot override the statutory opportunity to start the bargaining process, the notice to bargain served by the union, which was timely under the provisions of the Code, has the effect of terminating the collective agreement on March 31st, 1993 regardless of failure to comply with the notice provisions set out in paragraph 16 of that collective agreement.

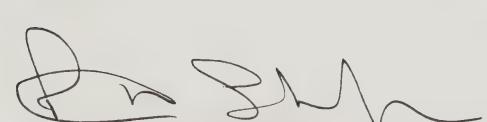
For these reasons, the application for certification granted by the Board on December 15, 1993 is timely under section 24(2)(a) of the Code.

  
\_\_\_\_\_  
J.F.W. Weatherill

Chairman

  
\_\_\_\_\_  
Michael Eayrs

Member

  
\_\_\_\_\_  
Patrick H. Shafer

Member

ISSUED at Ottawa, this 31<sup>st</sup> day of December, 1993.



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## Summary

Gino Giamarino, complainant, International Association of Machinists and Aerospace Workers, respondent, and Air Canada, employer.

Board File: 745-4485  
Decision No. 1047

The complainant alleged that the union breached section 37 of the Canada Labour Code (Part I — Industrial Relations) when it decided not to proceed to arbitration with his grievance.

The Board determined that disputes between a member and a union about the proper interpretation of a collective agreement in itself are not a proper foundation for a complaint under section 37. In the present case, the union reached its decision after properly turning its mind to the issues while taking into account the significance of the grievance and its consequences for the employee as well as the legitimate interests of the union.

In the absence of any indication of discrimination, bad faith or arbitrariness, upon which the union's decision not to proceed was based, the union's actions could not be found to be contrary to section 37.

The complaint is dismissed.

Ce document n'est pas officiel. Seuls les motifs de décision peuvent être utilisés à des fins juridiques.

## Résumé

Gino Giamarino, plaignant, Association internationale des machinistes et des travailleurs de l'aérospatiale, intimée, et Air Canada, employeur.

Dossier du Conseil: 745-4485  
Décision n° 1047

Le plaignant allègue que le syndicat a enfreint l'article 37 du Code canadien du travail (Partie I — Relations du travail) lorsqu'il a décidé de ne pas renvoyer son grief à l'arbitrage.

Le Conseil a jugé que les différends entre employé et syndicat concernant l'interprétation d'une convention collective ne justifient pas un plainte fondée sur l'article 37 du Code. En l'espèce, le syndicat en est arrivé à sa conclusion après avoir examiné attentivement les questions tout en tenant compte de l'importance du grief et des conséquences pour l'employé et des intérêts légitimes du syndicat.

Étant donné que le syndicat n'a pas fait preuve de comportement discriminatoire ou arbitraire ou de mauvaise foi en prenant sa décision, les mesures prises par le syndicat ne sont pas contraires à l'article 37 du Code.

La plainte est rejetée.



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Reasons for decision

Gino Giammarino,  
*complainant,*  
International Association of  
Machinists and Aerospace Workers,  
*respondent,*  
and  
Air Canada,  
*employer.*

Board File: 745-4485

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The Board:

Mr. Richard I. Hornung, Q.C., Vice-Chair, and Messrs.  
Robert Cadieux and François Bastien, Members.

Reasons: Richard I. Hornung, Q.C., Vice-Chair.

Appearances:

Mr. John Durham, for the complainant;  
Messrs. Michel Cyr, Ron Fontaine and Norm Metcheral,  
for the respondent; and  
Messrs. Guy Delisle and Arnold Powers, for the  
employer.

I

The applicant, Gino Giammarino, filed a complaint  
alleging that the respondent union had breached section  
37 of the Canada Labour Code. That section reads as  
follows:

"37. A trade union or representative of a  
trade union that is the bargaining agent for  
a bargaining unit shall not act in a manner  
that is arbitrary, discriminatory or in bad  
faith in the representation of any of the  
employees in the unit with respect to their  
rights under the collective agreement that is  
applicable to them."

II

In the past, the Board has dealt with, and dismissed without a hearing, a number of cases which essentially attacked the lay-off provisions of the collective agreement negotiated by the respondent union. The present complaint, however, did not, on its face, question the provisions of the collective agreement, but rather the union's interpretation and application of the agreement.

The Board was particularly concerned with Mr. Giannmarino's allegation that the union applied those provisions with respect to at least three other employees in a fashion which differed from the way they were applied to him; this, according to Mr. Giannmarino, amounted to discriminatory treatment and a breach of section 37.

The union denied the allegation.

To resolve this apparent conflict in evidence, a hearing was necessary.

III

Mr. Giannmarino is a station attendant employed by Air Canada at its Calgary facilities. In October 1992, he received a lay-off notice. By virtue of the lay-off ("bumping") procedure negotiated between the Union and the employer, Mr. Giannmarino was called upon to choose, in writing, locations to which he was prepared to bump into an alternate position. He chose Vancouver and

Saskatoon. By letter dated November 6, he was advised by the employer that he did not have sufficient seniority to bump employees in either Saskatoon or Vancouver and that, accordingly, he would be placed on lay-off status.

On December 6, 1992, Mr. Giamarino filed a grievance alleging that he had been laid off before the bumping process was completed and, as a result, three junior employees retained permanent employment in Vancouver. The grievance was denied by the employer. On January 28, 1993, the union President advised Mr. Giamarino that the union had determined not to proceed to arbitration with his grievance.

In his complaint, Mr. Giamarino submits that the union acted arbitrarily and in bad faith in dealing with his lay-off and bumping process. He alleges that two other employees were permitted to change their decision regarding the location to which they would bump, an option that he was not given. As a consequence, he was laid off while those employees were not.

In addition, Mr. Giamarino maintained that the lay-off provisions of the collective agreement (particularly articles 16.14 and 16.15) allow for senior employees, such as him, to bump junior employees on a system wide basis, notwithstanding their written choice of locations. According to Mr. Giamarino, the union's improper interpretation of the above clauses in the collective agreement has resulted in both an inequitable and inconsistent situation where three junior employees in Vancouver continue to work while he, and other more senior employees, have been laid off.

IV

The conduct of the union, in its representation of Mr. Giamarino, must be gauged in light of the principles established by the Supreme Court of Canada in Canadian Merchant Service Guild v. Gagnon et al., [1984] 1 S.C.R. 509; (1984), 9 D.L.R. (4th) 641; and 84 CLLC 14,043, where it stated:

*"The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*

1. *The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*

2. *When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*

3. *This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*

4. *The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*

5. *The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."*

(pages 527; 654; and 12,188)

V

We are satisfied, on the evidence, that the union did not treat Mr. Giamarino differently than other members, when it came to applying the lay-off

provisions of the collective agreement. Accordingly, with respect to this aspect of the case, we do not find that the union, in applying the bumping provisions, treated Mr. Giamarino in an arbitrary or discriminatory fashion.

VI

When reduced to its essence, the crux of Mr. Giamarino's complaint involved a dispute over the union's interpretation of the bumping provisions of the collective agreement, particularly clause 16.15.04.

Mr. Giamarino made a compelling argument that the bumping provisions, and their interpretation by the union, are both complicated and lead to what appears to be inequitable consequences for some senior employees. Although the interpretation of the clause advanced by Mr. Giamarino appears reasonable enough, it nevertheless differs from that taken and consistently applied by the union in the past.

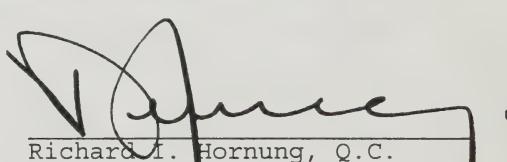
Disputes between a member and his union about the proper interpretation of a collective agreement are not a proper foundation for a complaint under section 37. The union may refuse to proceed to arbitration if it disagrees with the interpretation of the agreement that forms the basis of the employee's grievance (Gary Lloyd Ager (1991), 85 di 115 (CLRB no 875)).

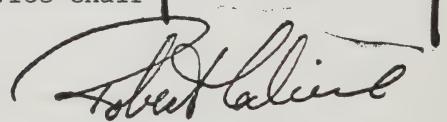
In addition, the Board will not, by virtue of a section 37 application, pass judgement or second-guess the union's decisions not to proceed to arbitration: see Brenda Haley (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 (CLRB no. 304); and Y.B. Poon et al.

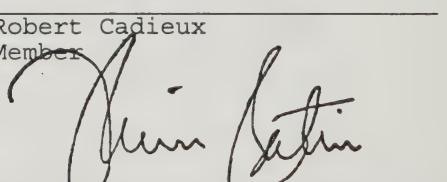
(1990), 79 di 156; and 90 CLLC 16,011 (CLRB no. 776). Our task is only to ensure that it does not exercise its exclusive authority unfairly, discriminatorily or in bad faith.

In the instant case, Mr. Giamarino attempted to persuade the union to proceed with a grievance based on an interpretation of the collective agreement which the union believed would not be upheld. In reaching its conclusion not to proceed, the union clearly turned its mind to the grievance and took into account "the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other" (Gagnon et al., supra). Having done so, and in the absence of any evidence of discrimination, bad faith, or arbitrariness on the part of the union, the union's actions cannot be found to be contrary to section 37.

Accordingly, the complaint is dismissed.

  
Richard I. Hornung, Q.C.  
Vice-Chair

  
Robert Cadieux  
Member

  
François Bastien  
Member

DATED at Ottawa this 23rd day of December, 1993.

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L100  
- IED

# Information

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## Summary

Gerald Day, applicant, Canadian National Railway Company, employer, and Labour Canada, intervenor.

Board File: 950-270

Decision No.: **1048**

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Referral of a safety officer's decision pursuant to section 129(5) of the Canada Labour Code (Part II - Occupational Safety and Health).

A carman, employed at CN Rail's GO Rail yard, refused an assignment which he considered dangerous due to the absence of adequate protection. His concern stemmed from an incident the night before where the safety rules, known as the system of "blue flag" rules, were violated by another employee while he was working on a car. The incident had been investigated and the employee disciplined for his action.

In the absence of proof that the "blue flag" system was not generally enforced and observed, the Board confirms the safety officer's decision that this was not a situation of danger within the meaning of the Code.

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

## Résumé

Gerald Day, requérant, Compagnie des chemins de fer nationaux du Canada, employeur, et Travail Canada, intervenant.

Dossier du Conseil: 950-270

Décision n° **1048**

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Renvoi d'une décision d'un agent de sécurité aux termes du paragraphe 129(5) du Code canadien du travail (Partie II - Sécurité et santé au travail).

Un voiturier, qui travaille à la gare de triage GO Rail de CN Rail, a refusé une affectation qui, selon lui, comportait du danger en raison d'un manque de protection adéquate. Sa préoccupation découlait de l'incident de la veille où un autre employé avait manqué aux règles de sécurité, connues comme système de drapeau bleu, pendant qu'il effectuait des travaux sur un wagon. L'employeur avait fait enquête et avait imposé à l'employé responsable des mesures disciplinaires.

En l'absence de preuve que le système de drapeau bleu n'était pas, de façon générale, mis en application ni respecté, le Conseil confirme la décision de l'agent de sécurité selon laquelle il n'y avait pas de danger au sens du Code.



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Relations  
Board

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Conseil  
Canadien des  
Relations du  
Travail

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Reasons for decision

Gerald Day,

*applicant,*

and

Canadian National Railway  
Company,

*employer,*

and

Labour Canada,

*intervenor.*

Board file: 950-270

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The Board was comprised of Mr. J.F.W. Weatherill, Chairman, sitting as a single member pursuant to section 156(1) of the Canada Labour Code (Part II - Occupational Safety and Health).

Appearances

Mr. John Merritt (Canadian Auto Workers) and Mr. Gerald Day, for the applicant;

Mr. J.C. McDonnell, for the employer; and

Mr. Keith MacDonald, safety officer, for the intervenor.

A hearing in this matter was held in Toronto on January 14, 1994.

The applicant referred to the Board a decision issued by a safety officer to the effect that there was no danger within the meaning of section 129 of the Canada Labour Code, in the circumstances to be described. The application is timely and no preliminary matters arose.

The circumstances are not in dispute. The applicant is a carman, employed at the employer's GO Rail yard at Willowbrook, in the Toronto area. He is an experienced employee, and familiar with the safety rules relating to

the circumstances in which the work in question must be performed. On October 5, 1994, Mr. Day was assigned to the midnight shift. His particular assignment involved working on a car which was spotted on P.M. (Progressive Maintenance) Track No. 3, inside the shop building at Willowbrook. Employees who work on a track, or on a car or locomotive on a track, and those who may be moving cars or locomotives on that track must follow certain specific safety rules, known generally as the "blue flag" rules. According to the rules, for an employee such as Mr. Day, assigned to work on a track within the shop, the following steps must be taken.

1. The employee must first check the work-in-progress board to ensure that no sign has been posted to show that train or car movements may be taking place on the track in question. If such a sign is posted, the employee must speak to a supervisor, or to employees working on the track, and may not proceed until the work-in-progress indication has been removed. When the board is clear, the employee then places his personal "blue flag" tag on the board. Only that employee is entitled to place that tag on the board or to remove it.
2. The employee must then ensure that a blue flag is placed on the track (in hours of darkness, there must also be a flashing blue light), outside the shop on the track in question. A derail must also be locked onto the track, and the switch on the track must be locked open. If the track is a "run through" track, that is, if there is access on the track through either end of the shop, the same procedure must be followed at both ends.

Where an employee's blue tag is on the board, anyone seeking to move a car or engine onto the track on which the employee is working must observe the following procedure.

1. Check the board to be sure no employee's blue tag is up. If there is a tag, the employee concerned must be called to remove it.
2. Ensure that a "move in progress" sign is on the board, when tags are cleared.
3. Ensure that the track door to the shop is open.
4. Remove the derail and blue flag.
5. Line the switch to the track.
6. Proceed as far as the shop door.
7. Make a public address announcement that the movement is entering the shop.
8. Proceed into the shop.

Clearly, if this procedure is followed, and if no one tampers with the switch, the blue flag or the derail while an employee's blue tag is on the board, employees may safely perform work on equipment on the track within the shop. Unless this procedure is strictly adhered to, the risk of an extremely serious and perhaps fatal accident is obvious.

While Mr. Day was at work on P.M. Track No. 3 on October 4, 1993 (the night before the incident in question), a

hostler, an employee who moves trains within a yard, unlocked the switch for the track in question, removed the derail and the blue flag, and proceeded to move a unit in the direction of the shop. These actions were in violation of the blue flag rules, and certainly created a situation of danger to Mr. Day. None of the parties is in any doubt about that. Mr. Day became aware of the train movement, got out of the car in which he was working (apparently just before the train entered the shop), and went to find a supervisor. The matter was subsequently investigated by the company; on hearing of this matter, the Board was advised that an employee had been disciplined for his actions.

On the following day, October 5, Mr. Day was assigned again to work in a car on P.M. Track No. 3. He refused the assignment, taking the position that such work was dangerous within the meaning of the Code. The claim of danger did not relate to any actual tasks which Mr. Day would perform, but rather to what he considered to be the absence of adequate protection when working in a car on that track.

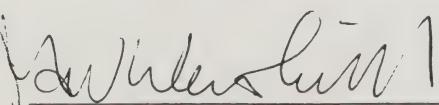
The procedures contemplated by the Code were followed (at least in substance), and a safety officer from Labour Canada was dispatched to the site, where he carried out what the Board considers as an appropriate investigation. After describing the "blue flag" rules and having visited the site, he concluded that this was not a situation of danger within the meaning of the Code. Mr. Day referred this question to the Board, as he is entitled to do.

As noted above, the system of "blue flag" rules is one which, if respected, ensures the safety of employees working on tracks such as those in question. Mr. Day,

however, takes the position that he has lost confidence in the system. If indeed the system were one in which employees could not reasonably have confidence - that is, if it were simply a "paper system" which was not rigorously followed and enforced - then it could not be said to guarantee workers' safety. The Board would then conclude that work on track such as this constituted a danger to employees, who would be entitled to refuse such work. In the instant case, however, while Mr. Day was understandably upset and properly concerned about the failure of the system which had occurred on October 4, it cannot reasonably be concluded from that violation of the system - which the company at once investigated, and in respect of which it imposed discipline - that the system itself was unreliable. It may be noted that the company offered Mr. Day his own lock and key for the switch, which would have given him personal control over any train movement on the track, but he refused that suggestion.

In the absence of proof that the blue flag system was not generally enforced and observed - and there is no such proof - it is the Board's conclusion that the determination made by the safety officer was correct, and that there was no danger within the meaning of the Code.

Accordingly, the conclusion of the safety officer is upheld.

  
J.F.W. Weatherill  
Chairman

ISSUED at Ottawa, this 21st day of January 1994.



# information

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## Summary

Public Service Alliance of Canada,  
applicant, and, Patterson Enterprises  
Ltd., employer.

Board File: 555-3631  
Decision No.: 1049

Application for certification by the  
Public Service Alliance of Canada for  
a unit of all employees of Patterson  
Enterprises Ltd. Certification granted.

In these reasons, the Board sets out its rationale for determining that the union membership evidence was, in this instance, the appropriate method of ascertaining employee support rather than the holding of a representation vote. In accordance with its policy with respect to the ascertainment of employee wishes, the Board considered that the fact that a majority of employees had signed statements of objection did not constitute a circumstance warranting a representation vote because they did not allege any impropriety in the membership evidence. And the Board was ultimately satisfied that no irregularities were found in the evidence.

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

## Résumé

Alliance de la Fonction publique du Canada, requérante, et Patterson Entreprises Ltd., employeur.

Dossier du Conseil: 555-3631  
Décision n°: 1049

Demande d'accréditation présentée par l'Alliance de la Fonction publique du Canada en vue de représenter tous les employés de Patterson Enterprises Ltd. Accréditation accordée.

Dans les présents motifs, le Conseil expose les raisons qui l'ont incité à décider que la preuve d'adhésion syndicale plutôt que la tenue d'un scrutin de représentation était en l'espèce la bonne méthode de déterminer l'appui de la majorité. En conformité avec sa politique relative à la détermination des désirs des employés, le Conseil a jugé que le fait que la majorité des employés avaient signé des déclarations d'opposition ne justifiait pas la tenue d'un scrutin de représentation, car les employés n'avaient pas allégué que la preuve d'adhésion comportait des anomalies. En outre, le Conseil est convaincu que la preuve ne comportait pas d'irrégularités.



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Reasons for decision

Public Service Alliance of Canada,

*applicant,*

*and*

Patterson Enterprises Ltd.,

*employer.*

Board file: 555-3631

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The Board was composed of Mr. J.F.W. Weatherill, Chairman, Ms. Mary Rozenberg and Ms. Véronique L. Marleau, Members.

Appearances (on record)

Messrs. Alain Piché and Darm Crook, for the Public Service Alliance of Canada (Union of Northern Workers); and

Messrs. Eldon Kerbes and Mike Stilwell, for Patterson Enterprises Ltd. (Management North Limited).

These reasons for decision were written by Ms. Véronique L. Marleau, Member.

These reasons are further to a decision of November 26, 1993 in which the Board granted the application for certification filed by the Public Service Alliance of Canada (PSAC or the Applicant). The Board then informed the parties that they would receive its reasons for decision at a later date.

I

The Application

The Applicant filed its application for certification on August 26, 1993. It had, at the time, the support of the majority of the employees in the bargaining unit. On September 17, 1993, the Board received statements signed by all employees whose

positions were sought for inclusion in that bargaining unit, expressing their wish not to be a member of, nor to be represented by the Applicant. Those statements were attached to the Employer's reply to the application for certification.

A. Position of the Employer

The Employer stressed that the employees had voluntarily signed the statements without influence from the Employer. Furthermore, the Employer took the position that while the employee statements had been signed after the application had been filed, the employees' wish not to be represented by the Applicant had arisen prior to August 26, 1993, as evidenced from their unanimous acceptance on August 18, 1993 of the agreement entered into with the Employer.

This agreement came about after the Employer was allegedly approached by the employees, prior to PSAC applying for certification to the Board, to develop some terms and conditions of employment. The employees wanted to see more formal commitments in writing rather than simply relying on verbal communication. The Employer, in turn, wanted to have their input into what was to become their employment manual. In response to this request, the Employer met with the employees during working hours on August 11 and 18, 1993. During the August 11 meeting, an employee advised the Employer that an organizing effort had taken place.

The Employer stressed that it then advised the employees that they had a right to join a union and that their decision could not be influenced by management. The employees were further informed that should they wish to advise the union of the discussions on the development of a personnel manual, they could do so immediately.

The Employer further stressed that during lunch hour in the course of the August 11 meeting, it contacted the Board to ascertain whether an application for certification

had been filed. It was only on being advised that no application had been filed with the Board that the Employer continued the process of developing terms and conditions of employment to be included in a personnel manual. After lunch, an employee advised the group that a conversation had taken place with a representative of the union during lunch time. The employees were asked if they wanted to continue the process. They unanimously agreed and asked that a date be selected for the following week.

The employees were advised on August 13 that Mr. Stilwell, the Employer representative, would be returning on August 18 to work with them to get their input and that they should advise management if this was acceptable. They did so verbally. The Employer alleged that it wished to ensure that it would not be violating the Code by changing terms and conditions of employment at a time when an application for certification was filed. Accordingly, the Employer waited six days from initial contact with the employees to meet again with them to develop terms and conditions to be included in a personnel manual. The second meeting was held on August 18, 1993. The terms and conditions of employment agreed upon were incorporated in a document titled "Employment Agreement between N.W.T. Forest Products, Hay River and The Employees."

In addition to provisions respecting terms and conditions of employment, including a profit-sharing plan, the agreement contains a provision for final settlement without stoppage of work (it establishes a grievance procedure) as well as a no-strike-or-lockout provision during the life of the agreement. It provides for the constitution of a Labour Management Committee, with equal representation and operating on a consensus basis without either party having veto power. The two-year agreement can only be amended by mutual consent and comes into effect on ratification by the employees and approval by the company's Board of Directors.

As this agreement was ratified by all employees on August 18, 1993, the Employer contended that the employees' wish not to be represented by a union, evidenced by their actual signing of documents indicating their change of heart, existed prior to the August 26 date of application for certification. Therefore, the fact that the employee petition was completed after the application for certification (namely, on September 7, 1993) was immaterial, or at the least, not determinative. The Employer argued that, in view of the employees' apparent change of heart, the Board should order a representation vote since it was now doubtful that the Applicant enjoyed the support of the employees sought for inclusion in the unit. The following portion of the Employer's reply contained in its letter of October 5, 1993 to the Board summarizes its position:

*"The employer is requesting a vote as employees have indicated their desire to not be represented by a Union of their own free volition. While the actual signing of documents by employees indicating their desire to not be represented by the Public Service Alliance of Canada was completed after the Application for Certification, we submit that there was a desire on the part of the employees prior to the date of Application for Certification to not be represented by a Union. There is some question that the employees may have been provided with false information by the Union representative including a statement that the employer would 'not tell the employees the truth'.*

*Employees are not always aware of the process requiring the Canada Labour Relations Board to receive letters should an employee change his or her mind. We believe that the Union has a responsibility to advise employees of the requirement to put in writing any requests to withdraw from or rescind their membership application in a Union and failed to do so.*

*The employer contends that the statements of revocation were generated by the employees themselves. The employees gave them to management to send to the Canada Labour Relations Board as they did not easily have access to postal services. The employer contends that the real wishes of the employees must be known. The Union is not contesting that the employees signed the statements; they are contesting on the grounds that the employer influenced the employees. We believe that the employees were unduly influenced by the Union to join and that they should be given the opportunity to decide through an organized and supervised vote conducted by the Canada Labour Relations Board."*

B. Position of the Applicant

The Applicant, in turn, took the position that its application had been made while it enjoyed the support of the majority of affected employees as evidenced by the signed membership cards. Furthermore, the employees had supported the Applicant during the organizing drive. PSAC alleged that the employee statements, submitted not by the employees themselves, but by the Employer, had been influenced by management and as such, could not be viewed as expressing the true wishes of the employees.

PSAC relied on the Board's established practice of determining employee support of an application for certification through signed membership cards as at the filing date of an application. It urged the Board to grant its application based on its demonstrated support as of the date of filing and to dismiss the Employer's request for a representation vote.

C. The Decision

Following an investigation into the matter and after having considered the submissions of the parties concerned, the Board decided not to order a vote and granted the application on the basis of the evidence of membership in PSAC adduced at the time of the filing of the application for certification.

In these reasons, the Board sets out its rationale for determining that the union membership evidence was, in this instance, the appropriate barometer for gauging employee support rather than holding a representation vote.

II

Ascertaining Employee Wishes

A. The Board's Discretion

Section 28(c) of the Code gives the Board the discretion to determine the appropriate date for ascertaining employee support in the union applying for certification, the appropriate method of ascertaining employee support (through union membership evidence or holding a representation vote), and what constitutes sufficient evidence of employee wishes:

"28. *Where the Board*

*(a) has received from a trade union an application for certification as*

*the bargaining agent for a unit,*

*(b) has determined the unit that constitutes a unit appropriate for collective bargaining, and*

*(c) is satisfied that, as of the date of the filing of the application or of such other date as the Board considers appropriate, a majority of the employees in the unit wish to have the trade union represent them as their bargaining agent, the Board shall, subject to this Part, certify the trade union making the application as the bargaining agent for the bargaining unit."*

(emphasis added)

The Board's discretion to determine the nature, quality and sufficiency of the evidence needed to ascertain employee wishes is reinforced by section 16(c) of the Code which provides the following:

*"16. The Board has, in relation to any proceeding before it, power*

...

*(c) to receive and accept such evidence and information on oath, affidavit or otherwise as the Board in its discretion sees fit, whether admissible in a court of law or not; ..."*

and by section 29(1) of the Code which vests the Board with a discretion to order a representation vote in any case:

*"29. (1) The Board may, in any case, for the purpose of satisfying itself as to whether employees in a unit wish to have a particular trade union represent them as their bargaining agent, order that a representation vote be taken among the employees in the unit."*

When considered within that framework, it becomes apparent that the Board's power to order a representation vote is only one of the means available to the Board for the purposes of ascertaining employee wishes. The other means is that of considering documentary evidence of support for a trade union as of the date of the application or as of such other date as the Board considers appropriate. In this latter regard, the Board exercised its powers under section 15 of the Code and adopted regulations which set forth the criteria for determining whether an employee is a member of a trade union and the circumstances in which evidence of membership of any employee in a union may be received by the Board as evidence that employees wish to have a particular trade union represent them as their bargaining agent. Sections 23 and 24 of the Board's Regulations provide:

*"Evidence of Employees' Wishes*

23. *In any application relating to bargaining rights,*

(a) *membership of an employee in a trade union is evidence that the employee wishes to be represented by the trade union as that employee's bargaining agent; and*

(b) *membership in a trade union of a majority of employees in a unit appropriate for collective bargaining is evidence that the majority of the employees in the bargaining unit wish to be represented by the trade union as their bargaining agent.*

*Evidence of Membership in a Trade Union*

24. *In any application relating to bargaining rights, the Board may accept as evidence of membership in a trade union evidence that a person*

(a) *has signed an application for membership in the trade union; and*

(b) *has paid at least five dollars to the trade union for or within the six-month period immediately before the date on which the application was filed."*

It is trite to say that the concept of discretion implies the power to make a choice between alternative courses of action. As de Smith puts it:

*"... If only one course can lawfully be adopted, the decision taken is not the exercise of a discretion but the performance of a duty. To say that somebody has a discretion presupposes that there is no uniquely right answer to his problem. ..."*

(S.A. de Smith, Judicial Review of Administrative Action, Fourth Ed., J.M. Evans (London: Stevens & Sons Limited), 1980, page 278)

Thus, the Board, which has the discretion to order a representation vote, can be compelled to exercise that discretion, but not to exercise it in any particular manner. That discretion, however, must be exercised in accordance with the Code which lays down certain guidelines in this respect. Indeed, in exercising its discretionary power, the Board must act within the statutory boundaries of that discretion (see Konstantinos Boulis v. Minister of Manpower and Immigration, [1974] S.C.R. 875, at page 877; and J.H. Grey, "Discretion in Administrative Law" (1979), 17 Osgoode Hall L.J. 107). The Code's Preamble establishes the general boundaries of the Board's discretion by providing that it must exercise the powers conferred upon it by Parliament in a manner that will encourage free collective bargaining and foster the development of good industrial relations.

B. The Board's Policy with Respect to the Ascertainment of Employee Wishes

In order to exercise its discretion in accordance with the Code, the Board has adopted a general policy which provides that when an application for certification is made, the date for determining the wishes of the majority of the employees pursuant to section 28 is the date of the filing of the application for certification unless circumstances exist which, in the opinion and discretion of the Board, warrant a representation vote.

The practice of policy-making, of adopting rules that further regulate the exercise of a discretion is an important aspect of the Board's exercise of the statutory discretion conferred by the legislator. Indeed, although the Board must exercise its discretion on a case-by-case basis, it may adopt a general policy relevant to the statutory question in issue (see Corporation of the Township of Innisfil v. Corporation of the Township of Vespra et al., [1981] 2 S.C.R. 145; and Henry L. Molot, "The Self-Created Rule of Policy and Other Ways of Exercising Administrative Discretion" (1972), 18 McGill L.J. 310). The main purpose of this is to achieve consistency while maintaining a safeguard against arbitrariness. Furthermore, it ensures that the discretion will be exercised to serve the purpose for which it was granted.

In Swan River - The Pas Transfer Ltd. (1974), 4 di 10; [1974] 1 Can LRBR 254; and 74 CLLC 16,105 (CLRB no. 8), the Board explained the rationale for its policy providing that the employees' wishes ought to be assessed at the date of the application:

*"On the other hand, many specialists in the field, we would venture to say the majority, claim that industrial peace is bound to be disrupted for long periods of time if the Board has to take into consideration events that take place between the date of the Application and any subsequent date.*

*Once it becomes known that after that deposit date the wish of the employees as expressed by the serious commitment of signing a card, accepting to be bound by a constitution and disbursing monies for union dues can be changed by a number of circumstances and affect the decision of a Labour Board, one will invite a chaotic labour relations situation. For example:*

- 1) *one would be bound to allow the union to pursue an active campaign among the employees in order to add to the list of members already filed in at the date of the Application. This practice is not followed today when the application date is the terminal date and to do so would make for disruption in the labour force.*
- 2) *one would be inviting some employers to go in for outright campaigning against the union aimed at persuading employees*

*to change their minds. Also, one would be tempting some employers to commit unfair labour practices to foster resignations from the Union. This would in turn provoke the unions into active counter-campaigning. All of which creates chaos. One may object here that there are resources under the law against employers who commit unfair labour practices. But this is of no assistance in the case of a sophisticated campaign where no unfair labour practice is capable of being proven and yet is so very effective in producing a change of mind or wish in the workers.*

- 3) *one would have to tolerate and deal with the intervention of a rival only too glad to try its luck with an afterthought application filed because of the chaotic situation prevailing after the date of application.*
- 4) *one would have to study the roots of apparently legitimate or contrived substantial changes in the overall complement of employees in the unit after the application date.*

*These are all realities of labour relations: all are disruptive of industrial peace.*

*Of course there are situations where a Labour Board has to ascertain the true wish of the employees by a vote. The obvious one is when it is alleged and eventually proven that the majority status was reached by illegal methods, threats, false representations or fraud vis-a-vis the employees. Then a Board might reject the application or order a vote. Or where new plants are in the process of being staffed a Board may set down criteria for ascertaining when a plant has really become operative. This could mean a vote among employees, including those hired after the date of the application.*

*However, outside of these circumstances, if the date of applications is not determinant and all of the above situations are allowed to develop, a Labour Board might be reduced to ordering votes in almost all cases.*

*In general, this second school of thought claims the best way to achieve industrial peace and stability in this connection, is to establish a machinery whereby the workers are impressed with the seriousness of signing a union card and disbursing money since this will be considered as the chief and best expression of their free wish maturely arrived at and, once it is so expressed, it cannot be changed at will or easily after the application is made on their behalf. By such a system, if a majority has been reached legally, certification will almost inevitably issue.*

*This must be a system where the employers know that it is virtually useless to campaign to obtain resignations once the application is in; a system where, once the application is made, the union will stop campaigning to obtain signatures because it would serve no purpose in the establishing of the majority status; a system which will not create a temptation for some employers to commit unfair labour practices to obtain resignations or indulge in effective legal campaigning against the union."*

The Board still posts notice of application to which employees may reply; however, in accordance with that policy, it gives no weight to replies contradicting previous membership evidence unless they allege some impropriety: see Canadian Imperial Bank of Commerce, Sioux Lookout (1978), 33 di 432; and [1979] 1 Can LRBR 18 (CLRB no. 158); and Toronto-Dominion Bank v. Canada Labour Relations Board, [1979] 1 F.C. 386; (1978), 88 D.L.R. (3d) 256; and 78 CLLC 14,150. Apart from situations involving particular raid applications, in exercising its discretion under section 29(1) of the Code, the Board will only order a representation vote where it suspects that union membership evidence is tainted or irregular. Those are the special circumstances that must be present for the Board to depart from its practice of using membership cards to establish the representative character of a union: see Murray Bay Marine Terminal Inc. (1983), 50 di 163 (CLRB no. 401), at pages 168-169; and Sedpex Inc. (1985), 63 di 102 (CLRB no. 543), pages 112-123.

C. The Exercise of the Board's Discretion in the Present Case

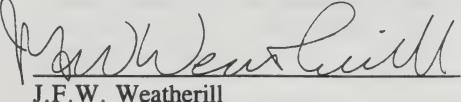
In the present case, the Board considered that the fact that a majority of employees had signed the statements of objection did not constitute a circumstance warranting a representation vote because they did not allege any impropriety in the membership evidence. And the Board was ultimately satisfied that no irregularities were found in that evidence.

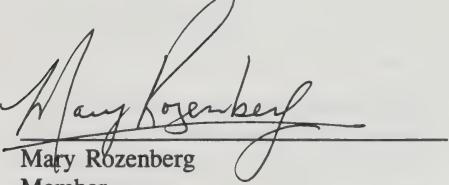
As regards the contention that the employees' wish not to be represented by the Applicant had arisen prior to the filing date of the application, the Board is of the opinion that those letters were written as a result of the Employer's intervention and, therefore, with influence from the Employer. The employee statements were prepared by the Employer, were collected by the Employer and were forwarded to the Board by the Employer. Thus, the fact that the Employer acted in a manner that influenced the employees to make a choice in its interest served to discredit the evidentiary value of the petitions.

However, the Board wishes to make it clear that this finding bears only on its decision concerning the appropriateness of holding a representation vote. It may well be that in many other respects the Employer's approach served the employees' interests. In the present case, instead of making tempting promises to its employees in the hope of having them change their minds about the system they would use to deal with their Employer (individual versus collective bargaining), the Employer acted. It sat down with its employees to develop some terms and conditions of employment. In addition to sending the message across to its employees that it was taking them seriously, the

Employer, by taking that route, also demonstrated that it wanted to maintain a harmonious and mutually beneficial relationship. Although not material to the Board's conclusion, such an approach cannot be left unnoticed for this, of course, is one of the goals to which the Code is directed.

This is a unanimous decision.

  
\_\_\_\_\_  
J.F.W. Weatherill  
Chairman

  
\_\_\_\_\_  
Mary Rozenberg  
Member

  
\_\_\_\_\_  
Véronique L. Marleau

Member

ISSUED at Ottawa, this 13th day of January 1994.

CLRB/CCRT - 1049



CAB  
L100  
- 1102

# Information

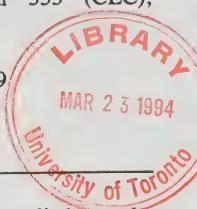
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## Summary

International Longshoremen's and Warehousemen's Union, Ship and Dock Foremen, Local 514, applicant, Prince Rupert Grain Ltd., employer, and Grain Workers Union, Local 333 (CLC), intervenor.

Board File: 555-3589

Decision no. 1050



The applicant union applied to be certified as bargaining agent for the foremen at Prince Rupert Grain Ltd.

In 1983, the Board rejected the one employer unit and determined that the appropriate unit consisted of all foremen employed by the member companies of the British Columbia Terminal Elevator Operators' Association, including Prince Rupert Grain. In a subsequent vote, there was insufficient support within the unit described to certify any union.

Since more than 10 years have passed and no unit consisting of foremen is certified in the grain industry, the applicant argued that it is now time to allow a single unit of foremen at Prince Rupert Grain.

The Board reviewed its past decisions dealing with the grain industry and with the determination of appropriate bargaining units.

In determining an appropriate unit, the Board's aim is to balance two objectives enshrined in the Code: (1) the employees' right of access to collective bargaining; and (2) the establishment of a unit that will foster industrial peace and stability. Employee access to collective bargaining is the primary focus in initial certification applications. However, in circumstances where there is a collective bargaining regime in place, industrial stability must be given greater weight. In addition to the traditional factors that

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## Résumé

Syndicat international des débardeurs et magasiniers, Ship and Dock Foremen, section locale 514, requérant, Prince Rupert Grain Ltd., employeur, et Grain Workers Union, section locale 333 (CTC), intervenant.

Dossier du Conseil: 555-3589

Décision n° 1050

Le syndicat requérant a présenté une demande d'accréditation à titre d'agent négociateur d'un groupe de surveillants (contremaires) qui travaillent pour Prince Rupert Grain Ltd.

En 1983, le Conseil avait rejeté l'unité chez un seul employeur et avait jugé que l'unité habile à négocier se composait de tous les contremaires qui travaillaient pour les compagnies membres de la British Columbia Terminal Elevator Operators' Association, y compris Prince Rupert Grain. Dans un scrutin tenu par la suite, aucun syndicat n'avait obtenu un appui suffisant des membres de l'unité pour être accrédité.

Étant donné que plus de 10 ans se sont écoulés et qu'aucune unité composée des contremaires du secteur des grains n'a été accréditée depuis, le requérant prétend qu'il est grand temps d'accréditer une telle unité à Prince Rupert Grain.

Le Conseil a passé en revue ses décisions portant sur le secteur des grains et sur la détermination d'unités habiles à négocier.

Lorsqu'il détermine une unité habile à négocier, le Conseil tente d'équilibrer les deux objectifs du Code: (1) l'accès des employés à la négociation collective; et (2) la création d'une unité qui favorisera la paix et la stabilité industrielles. L'accès à la négociation collective est le point central de premières demandes d'accréditation. Cependant, si un régime de négociation collective est en place, la stabilité industrielle doit peser plus lourd dans la balance. En plus des facteurs traditionnels dont il doit tenir compte, le

must be weighed, the Board will also look at the practice and history of the current collective bargaining scheme as well as the practice and history of collective bargaining in the industry.

The Board also commented on an applicant's responsibility to show that a previous unit determination by the Board is no longer appropriate.

The Board was satisfied that stability in the grain industry on the West Coast is best served by maintaining a unit which includes the foremen at the Prince Rupert Grain terminal with the foremen at the port of Vancouver.

The unit sought was not appropriate, and the application for certification is dismissed.

Conseil doit examiner les pratiques et l'historique du régime existant de la négociation collective ainsi que les pratiques et l'historique de la négociation collective dans le secteur d'activité visé.

Le Conseil a également parlé de la responsabilité qui incombe à un requérant de démontrer que la description d'une unité déterminée par le Conseil n'est plus habile à négocier.

Le Conseil est convaincu que, dans l'intérêt de la stabilité dans le secteur des grains sur la côte ouest, il y a lieu de maintenir une unité qui inclut les contremaîtres de Prince Rupert Grain et les contremaîtres au port de Vancouvr.

L'unité visée n'est pas habile à négocier; la demande est par conséquent rejetée.

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Travail

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Reasons for decision

International Longshoremen's and  
Warehousemen's Union, Ship and Dock  
Foremen, Local 514,

*applicant,*

and

Prince Rupert Grain Ltd.,

*employer,*

and

Grain Workers Union, Local 333  
(CLC),

*intervenor.*

Board File: 555-3589

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The Board:

Mr. Richard I. Hornung, Q.C., Vice-Chair, and Messrs.

Calvin B. Davis and François Bastien, Members.

Appearances:

Mr. Bruce A. Laughton, for the applicant;

Mr. Eric J. Harris, for the employer; and

Mr. John A. Hodgins, for the intervenor.

Reasons: Mr. Richard I. Hornung, Q.C., Vice-Chair.

I

The International Longshoremen's and Warehousemen's Union, Ship and Dock Foremen, Local 514, (the union or ILWU) applied to be certified as the bargaining agent for the following unit:

"all employees employed by Prince Rupert Grain Ltd. working at the Ridley Island Elevator in Prince Rupert known as operations supervisor, maintenance supervisor, technical supervisor, maintenance supervisor/purchaser, operations superintendent, plant system superintendent, maintenance superintendent."

By agreement of the parties, the union's application was amended to exclude the operations superintendent, plant system superintendent, and maintenance superintendent.

The only issue addressed at the hearing was whether or not the single employer unit at Prince Rupert Grain Ltd. (Prince Rupert Grain) was appropriate. It was agreed that the exclusions would be dealt with through written submissions which the parties would forward to the Board following the hearing.

At the commencement of the hearing, following submissions by all parties, the Board granted the Grain Workers Union, Local 333 (GWU or Local 333) intervenor status, pursuant to section 12(3) of the Board's Regulations, in order to present argument regarding the appropriate unit issue.

II

Labour relations in the grain industry on the West Coast has been the focus of a number of Board decisions over the years. Without chronicling them in detail, a historical perspective on the key events of the recent past is essential for a proper understanding of the issues before us.

Between 1949 and 1972, the Board issued orders certifying Local 333, for separate groups of employees of the five terminal elevators in the port of Vancouver. In 1977, the Board rendered a decision which essentially dealt with three matters central to the present case: (1) it dismissed an application for certification by the Grain Handlers Union Local 1 seeking to represent the

employees of only the Saskatchewan Wheat Pool terminal for which Local 333 was already certified; (2) it granted an application for certification by Local 333 for a unit of all operational employees of the five terminal elevators in the port of Vancouver; and, (3) at the same time, it designated the British Columbia Terminal Elevator Operators' Association (BCTEOA or the Association) as employer for the purposes of the certification granted to Local 333 (see Saskatchewan Wheat Pool et al. (1977), 21 di 388; [1977] 1 Can LRBR 510; and 77 CLLC 16,014 (CLRB no. 83)).

In 1979, the Prince Rupert Grain terminal no.1 (commonly known as PRG 1) was privatized, and the attendant labour relations jurisdiction was transferred from the Public Service Staff Relations Board to this Board. This transfer resulted from a series of developments within the grain industry, the centrepiece of which was the decision to construct a second highly computerized terminal (PRG 2) in Prince Rupert under the aegis of a consortium of six grain elevator companies. The consortium took over operations of PRG 1 in 1980, thereby inheriting the employees of that terminal who were, until then, represented by the Public Service Alliance of Canada (PSAC).

Local 333 became, with the concurrence of the PSAC, the bargaining agent for those employees of the terminal who chose at the time to leave the public service and take jobs with the private employer. In 1980, that union was certified to represent employees of Prince Rupert Grain Terminal Consortium Limited, later changed to Prince Rupert Grain Terminals Limited (see Northern Sales Company Limited (1980), 40 di 128; [1980] 3 Can LRBR 15; and 80 CLLC 16,033 (CLRB no. 245)).

In 1983, the applicant, ILWU Local 514, applied to be certified, on a single employer basis, to represent the foremen at three terminals in the port of Vancouver. In its decision (files 555-1867, 555-1895, 555-1896, and 555-1909) the Board, after designating the BCTEOA as the employer, stated:

*"The appropriate bargaining unit consists of all foremen employed by the member companies of the B.C. Terminal Elevator Operators' Association".*

For clarification, the member companies of the B.C. Terminal Elevator Operators' Association are: Saskatchewan Wheat Pool, Alberta Wheat Pool, Pioneer Grain Terminal Limited, Pacific Elevators Limited, United Grain Growers Limited, and Prince Rupert Grain Limited."

(emphasis added)

A vote was ordered. There was insufficient support within the unit described.

In 1986, the construction and operation of the new terminal (PRG 2) was the subject of an application to this Board under the technological change provisions of the Code. After dealing with the technological change aspect of the case, the Board extended the representational rights of Local 333 to PRG 2. When the new terminal became operational in early 1986, PRG 1 was closed (see Prince Rupert Grain Ltd. (1986), 67 di 104; and 86 CLLC 16,056 (CLRB no. 592)).

The West Coast terminal employers in the port of Vancouver have had co-ordinated collective bargaining since 1951, a situation which led to the formation by five companies in 1957 of the Association. The

consequence was the negotiation by the Association of collective agreements exhibiting almost identical terms from one company to the other. As indicated, in 1977 the Association was designated by the Board as the employer for the purposes of the Code.

Prince Rupert Grain became a member of the Association in 1980 and as such was a party to the industry-wide agreements the Association negotiated for the calendar years 1980 through 1983. Although Prince Rupert Grain joined the Association in 1980, it was never designated by the Board as a member of that Association for the purposes of collective bargaining pursuant to section 33 of the Code.

This led to two subsequent applications in 1986 and 1987, in which the Association and Local 333 took diametrically opposite positions from those taken in the present case. These applications, and the positions taken by Local 333 and Prince Rupert Grain or the Association, have clouded the overall picture with respect to the Association's bargaining authority vis-à-vis Prince Rupert Grain.

Prince Rupert Grain and Local 333 went on separate bargaining tracks for the round of negotiation subsequent to 1983 insofar as they focused on issues arising from the construction and, later, the coming into operation of PRG 2 followed by the closure of PRG 1 referred to earlier. Although a memorandum of agreement providing for a renewed collective agreement between the Association and Local 333 was signed in 1985, it did not settle the dispute regarding the ongoing negotiations with Prince Rupert Grain.

In 1986, Prince Rupert Grain sought a declaration from the Board that the collective agreement signed by the Association and Local 333 for the port of Vancouver was binding on that union and Prince Rupert Grain. Local 333 argued that it was; Prince Rupert Grain argued that it was not. The Board ruled that although a collective bargaining agreement had been concluded for the other member companies, none was concluded for Prince Rupert Grain insofar as section 131(2) (now section (33)) binds each employer member only:

*"to the extent that the members were recognized by the Board as being members at the time of the original designation by the Board..."*

(Prince Rupert Grain Ltd. (1986), 67 di 104; and 86 CLLC 16,056 (CLRB no. 592))

Ultimately, in 1988, Parliament legislated the grain workers back to work at Prince Rupert Grain. The Act applied only to Prince Rupert Grain, but imposed on the parties the collective agreement then in force at the other companies. The result was that Prince Rupert Grain was covered by essentially the same collective agreement that bound Local 333 and the other members of the Association.

The confusion was exacerbated by the position taken by Local 333 in challenging a Board order including Prince Rupert Grain in the Association. In Grain Workers Union, Local 333 v. British Columbia Terminal Elevator Operators' Association and Prince Rupert Grain (1989), 101 N.R. 105 (F.C.A. A-931-88), the Federal Court of Appeal quashed a Board order issued in Prince Rupert Grain Ltd. (1988), 75 di 13 (CLRB no. 706), which

included Prince Rupert Grain terminal employees in the multi-employer bargaining unit certified in 1977. Having regard to the position taken by Prince Rupert Grain in the earlier case, it appears the union demonstrated to the Association that sauce for the goose was proverbial sauce for the gander. The Court concluded that, in amending its original designation order, the Board had exceeded its jurisdiction by short-circuiting the specific process provided for in the Code and used at the time the initial order was issued (Grain Workers Union, Local 333 v. British Columbia Terminal Elevator Operators' Association et al., supra).

The two legal impediments to a full recognition of Prince Rupert Grain as member of the Association, as set out above, have not, as stated in the applicant's written submissions to the Board, "precluded (Prince Rupert Grain) from bargaining through the Association and arriving at standardized terms with respect to the Employer's operations".

Leaving aside these two particular episodes, driven as they were by the parties' ulterior motives and a non-recurring event, it is clear that since privatization, Prince Rupert Grain Terminal Limited has carried on its labour relations as a de facto member of the Association. This was not challenged by the applicant.

In the present application, both the Association and Local 333 were adamantly in favour of the larger multi-employer unit. They argued that the existing de facto multi-employer unit for operational employees, which includes Prince Rupert Grain, demonstrates the stability that the larger unit configuration provides.

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The positions taken by Local 333 and the employer before the Board in this application contrast dramatically with their previous positions in the applications of 1987 and 1988.

### III

The issues raised in this application were first identified by the Board in the first certification application which involved the current parties. In Saskatchewan Wheat Pool et al. (1977), 21 di 388; [1977] 1 Can LRBR 510; and 77 CLLC 16,104 (CLRB no. 83) the Board stated:

"The determination of an appropriate bargaining unit is the sole responsibility of the Board,... The Board's determination may have serious consequences for the parties: '...the choice of a unit may well constitute the decisive factor between unionism and non-unionism. Moreover, the choice of one unit configuration over another may heavily influence which labour organization will gain representation rights' (Abodeely, The NLRB and The Appropriate Bargaining Unit, University of Pennsylvania Press, 1971, p.1).

The Board recognized this in Canadian Pacific Ltd., supra. We must weigh the competing interest of establishing, developing and continuing 'sane and healthy collective bargaining relationships' (p. 365) on the one hand, and 'making it possible for employees to assert their rights' (p. 365) on the other hand. Often these two objectives seem incompatible in many circumstances. The British Columbia Labour Relations Board expressed this conflict in these terms:

'The statute gives no specific direction for the exercise of our judgment and we must develop the guidelines on our own. That is a difficult task for several reasons, but primarily because there is a tension between the two uses of the bargaining unit. On the one hand, the scope of the unit is the key to securing trade union representation and collective bargaining rights for the employees. Since this is a fundamental purpose of the Code, the Board's definitions must be such as to facilitate organization of the employees. On the other

hand, that unit sets the framework for actual bargaining for a long time into the future. A structure is needed which is conducive to voluntary settlements without strikes and will minimize the disruptive effects of the latter when they do occur. Unfortunately, the lesson of experience is that these two objectives often point in different directions.

(Insurance Corporation of British Columbia, (75 CLLC 16,146); [1974] 1 Can LRBR 403 at page 407)'"

(pages 401; 519-520; and 16,712-16,713; emphasis added)

The question of whether or not employees at Prince Rupert Grain share common interests with their fellow employees in the grain industry in the port of Vancouver was not seriously challenged. Although employees in the grain industry have long-term relationships with one employer, as well as with fellow employees in each work place, they have a common interest in the industry. Essentially the same community of interest conclusions were reached by previous panels of this Board. In Prince Rupert Grain Ltd. (1988), 75 di 13 (CLRB no. 706), the Board made the following comments:

"Although the Employer to be added (PRG) maintains a terminal elevator in Prince Rupert, there is an undeniable community of interest between all the employees in the grain industry in the Province of British Columbia, and it is equally undeniable that all employees be bound together under one Certification Order..."

(page 15)

We are of the same view. The foremen at the Prince Rupert Grain terminal share a sufficient community of interest with those working at the port of Vancouver to warrant their inclusion in the same bargaining unit.

The Board's preference for larger units and the factors it considers in determining the appropriateness of a unit (administrative efficiency, lateral mobility, common framework of employment conditions, and industrial stability) have been addressed in a number of decisions, including: Canadian Pacific Limited (1976), 13 di 13; [1976] 1 Can LRB 361; and 76 CLLC 16,018 (CLRB no. 59); Wardair Canada (1975) Ltd. (1983), 53 di 26; and 2 CLRBR (NS) 129 (CLRB no. 409); National Bank of Canada (1985), 58 di 94; 11 CLRBR (NS) 257; and 86 CLLC 16,032 (CLRB no. 542); Purolator Courier Ltd. (1989), 77 di 1 (CLRB no. 730); Air B.C. (1990), 81 di 1; 13 CLRBR (2d) 276; and 90 CLLC 16,035 (CLRB no. 797); and Canada Post Corporation (1990), 81 di 187; and 14 CLRBR (2d) 195 (CLRB no. 818).

In applying the considerations set forth in the above cases, the Board's aim is to balance two objectives enshrined in the Code: the first being the employees' right of access to collective bargaining; the second, the establishment of a unit that will foster industrial peace and stability.

It is trite, but nevertheless true, to say that the determination of the appropriate bargaining unit is factual and depends on the circumstances of each case. However, in making that determination, the Board must decide which of the various factors or considerations, as outlined in its jurisprudence, should be given greater or lesser weight. Employee access to collective bargaining is the primary focus in initial certification applications. However, in circumstances where there is an existing collective bargaining regime in place, industrial stability must be given greater weight. To do otherwise would be to ignore the potential pitfalls

and industrial instability that multiple units could create.

In Island Medical Laboratories et al. (BCLRB No. B308/93, September 21, 1993) the British Columbia Labour Relations Board distinguished between initial certification applications - where there is no collective bargaining relationship whatsoever - and applications where bargaining units are in place.

The B.C. Board observed:

"Industrial stability, however, has different facets, depending upon whether one is at the initial stage of certification or at the second or additional stage of certification. At the initial stage of certification, the concern with industrial stability is with the design of the bargaining unit ... However, at the second or additional stage of certification the concern is threefold: first, the design of the bargaining unit; second, the proliferation of bargaining units; and third, the relationship not just between the second or additional units and the employer but between the units themselves. As the number of units increases, so does the potential for industrial instability.

At the second or additional stage of certification, among the four criteria cited in ICBC - administrative efficiency and convenience, lateral mobility, common framework of employment conditions and industrial stability - we see industrial stability as the most crucial factor. The factors of administrative efficiency and convenience, lateral mobility, and a common framework of employment conditions really go to only one factor: the simplification of the administration and negotiation of collective agreements (and thus contribute to industrial stability). It is axiomatic in labour relations that a proliferation of bargaining units increases the potential for industrial instability..."

(page 31)

In order to focus on the industrial stability facet, the decision suggests that where additional applications for

certification are made, two further considerations, in addition to the traditional factors which the Board weighs, are to be addressed when determining the appropriate unit:

*"... The practice and history of the current collective bargaining scheme.*

*... The practice and history of collective bargaining in the industry or sector."*

(page 32)

These two further considerations are significant in the present application. There is at present no "current collective bargaining scheme" affecting Prince Rupert Grain alone or on a multi-employer basis. Accordingly, examining the history and practice of collective bargaining in the grain industry in general, and at Prince Rupert Grain in particular, will provide particular assistance in addressing the industrial stability issue.

A historical review of the Board's previous decisions: (see Saskatchewan Wheat Pool et al., supra; Northern Sales Company Limited, supra; British Columbia Terminal Elevator Operators' Association, September 9, 1983, (files 555-1867, 555-1895, 555-1896 and 555-1909); Prince Rupert Grain Ltd. (1986), 67 di 104; and 86 CLLC 16,056 (CLRB no. 592); Prince Rupert Grain Ltd. (1988), 75 di 13 (CLRB no. 706); and Grain Workers Union, Local 333 v. B.C. Terminal Elevator Operators' Association et al., supra) makes it apparent that in each of those cases the Board determined, in one form or another, that a multi-employer unit was appropriate for operational employees in the grain handling industry on the West Coast. Even in those cases which were dealt with by the

Federal Court of Appeal on other grounds, it was clear that the Board concluded that the appropriate unit in question included the employees at Prince Rupert Grain.

It is equally clear that since 1980, leaving aside the two aberrant applications described earlier, Prince Rupert Grain has been considered to be a **de facto** member of the Association and has become intricately integrated in the collective bargaining process with the other members of the Association insofar as the operational employees are concerned.

A review of the bargaining history in the industry vis-à-vis operational employees also demonstrates that notwithstanding the single employer certification of Prince Rupert Grain in 1980, the **practice** of the parties affected has been to include Prince Rupert Grain as part of the Association and negotiate the terms of the collective agreement for operational employees on a multi-employer basis.

In the current circumstances, the Board is concerned with the apparent potential for industrial instability that might occur if the unit configuration determined by the Board in its 1983 decision were restructured and single employer units were to become the object of certification applications involving foremen.

The experience in the industry, as it relates to the operational employees, indicates that the "1983" unit provides both the access to employees rights and the industrial stability which the Board must balance in making its determination. The considerations addressed in previous Board decisions and the factors examined herein persuade us that the unit for foremen, as

determined appropriate by the Board in 1983, remains an appropriate unit that will ensure both the assertion of employee bargaining rights and industrial stability.

IV

The final issue to be addressed is the union's assertion that the unit deemed appropriate by the Board in 1983 has stymied its ability to obtain a certification order with respect to foremen employed by grain companies in British Columbia.

In file 555-1909, the Board determined that the appropriate bargaining unit consists of all foremen employed by the Association's member companies and concluded, in its clarifying note, that those member companies include the Prince Rupert Grain terminal.

However, the Board is not bound by its earlier finding and may change it in response to developments and changes that occur in the grain handling industry (see National Bank of Canada, supra). Inversely, although the Board is not bound by an earlier determination, that does not mean that it will disregard its previous decisions entirely.

The applicant union urges us to conclude that the 1983 unit has stymied its ability to organize in view of the fact that no certification application has been made to the Board for the employees involved since that date. This is confirmed by a review of the Board's records. It argues, in quoting from Woodward Stores (Vancouver) Ltd., [1975] 1 Can LRBR 114 (BCLRB) at page 118, that "...it makes no sense to stick rigidly to a conception

of the best bargaining unit in the long term, when the effect of that attitude is to abort the representation effort from the outset." That principle is sound, and one which we adopt without reservation. However, outside of the union's bare assertion, there is no evidence or reasonable inference that would lead us to conclude that the unit described by the Board in its 1983 order has prevented the inclusion of foremen in that bargaining unit.

This is not to suggest that the union must prove that the previously defined unit is inappropriate. The obligation to determine the appropriate unit remains with the Board. However, in circumstances where the Board has already determined the appropriate unit, and a subsequent application is made for another unit which does not coincide with the Board's earlier finding, it stands to reason that the Board should be assisted in its task by evidence that supports the union's claim that the unit described by the Board is either traditionally, or by experience, too difficult to organize.

The Board must presume that the unit configuration which it ascribed is appropriate. If the union applies for another unit it should, from a purely practical perspective, be in a position to provide evidence that the earlier unit is not appropriate. This does not create a burden of proof but rather, if you will, a practical evidential responsibility.

In National Bank of Canada, supra, the Board, after establishing the limits of discretion in determining the appropriate unit and outlining that it is not bound by any earlier finding, makes the following comment:

"This also makes it essential that we reject the concept of stare decisis in the exercise of this discretion by the Labour Boards. A Board must take into account developments and new needs in the field and cannot be bound by an earlier determination if it is to respond rapidly and satisfactorily to the changes occurring in modern business."

(pages 139; 300; and 14,313; emphasis added)

Faced with similar considerations the B.C. Board in Island Medical, supra, made the following observation:

"To establish that a sector or industry or group of employees is traditionally difficult to organize, the evidence can include the following:

- (a) the Board's own records - i.e., collective agreements and certifications.
- (b) evidence of individuals with experience in the sector or industry.
- (c) expert evidence concerning the sector or industry.

The evidence should establish a low-union density either in the particular industry or among the group of employees which reflects structural or systemic aspects of the workforce which have made it difficult to organize."

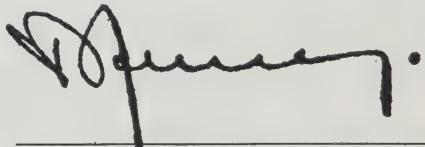
(page 37)

Although not in itself determinative, there was no evidence of developments and new needs in the field, or changes occurring in the grain handling industry as referred to in National Bank of Canada, supra, nor of organizational difficulty, as referred to in Island Medical, supra, which would urge the Board to replace the 1983 unit description.

V

In the result, we are satisfied that industrial stability will best be served by maintaining a unit that includes the foremen at the Prince Rupert Grain terminal and the foremen in the port of Vancouver.

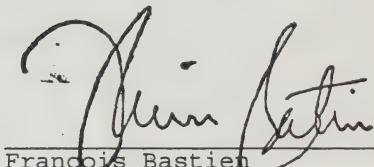
Accordingly, the unit sought is not appropriate, and the application for certification is dismissed.



Richard I. Hornung, Q.C.  
Vice-Chair



Calvin B. Davis  
Member



François Bastien  
Member

DATED at Ottawa this 2nd day of March 1994.

CAI  
L100  
- IFS

# information

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## Summary

Canadian Air Line Pilots Association, complainant union, Jetall Holdings Corporation, respondent employer.

Board files: 745-4446  
745-4490

Decision no.: 1051

These Reasons for decision concern three complaints that were filed with the Board as a result of the termination of three pilots of Jetall Holdings Corporation.

The complainant union alleged that Jetall had terminated the three pilots because of their union activities and had thus violated sections 94(1)(a), 94(3)(a), (b), (c) and (e) and 96 of the Canada Labour Code (Part I — Industrial Relations).

The Board determined that anti-union animus did in fact exist at the time of the terminations, but that it tainted only the decision to terminate Captain John Taylor who organized the union drive. The termination of the two other pilots was strictly based on administrative reasons.

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

## Résumé

Association canadienne des pilotes de lignes aériennes, syndicat plaignant, et Jetall Holdings Corporation, employeur intimé.

Dossiers du Conseil: 745-4446  
745-4490

Décision n° 1051

Ces motifs de décision visent trois plaintes dont le Conseil a été saisi par suite du congédiement de trois pilotes de la compagnie Jetall Holdings Corporation.

Le syndicat plaignant prétend que Jetall a congédié les trois pilotes en raison de leurs activités syndicales, ce qui constituerait une violation des alinéas 94(1)a, 94(3)a, b), c) et e) et de l'article 96 du Code canadien du travail (Partie I — Relations du travail).

Le Conseil est d'avis qu'il existait à l'époque un sentiment antisyndical, mais que seul le congédiement de John Taylor, responsable de la campagne de syndicalisation, peut y être attribué; les deux autres congédiements reposent sur des motifs purement administratifs.

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LES MOTIFS DE DECISION DU CCRT SONT  
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Reasons for decision

Canadian Air Line Pilots  
Association,

*complainant union,*

Jettall Holdings Corporation,

*respondent employer.*

Board Files: 745-4446  
745-4490

---

The Board was composed of Mr. Jean L. Guilbeault, Q.C., Vice-Chair,  
Ms. Mary Rozenberg and Mr. Patrick H. Shafer, Members.

Hearings into these matters were held at Toronto on May 11 and 12, and on  
August 10 and 11, 1993 in file no. 745-4446 and on August 12, 1993 in file no.  
745-4490.

Appearances

Mr. John Keenan, Counsel, assisted by Ms. Lila Stermer and Ms. Geneviève  
Dufour, for the complainant;

Mr. Carl Peterson, Counsel, assisted by Mr. John Tillger and Mr. Grey  
Cooper, for the respondent.

These reasons for decision were written by Mr. Jean L. Guilbeault, Q.C., Vice-Chair.

On March 15, 1993, the Canadian Air Line Pilots Association (CALPA) filed  
complaints with the Board alleging that Jettall Holdings Corporation (Jettall) had  
contravened sections 94(1)(a), 94(3)(a), (b), (c) and (e) and 96 of the Canada  
Labour Code by laying off Captain Earl Hopkins and Captain John Taylor

because of their attempts to organize Jettall pilots (file 745-4446). On April 29, 1993, CALPA filed another complaint (file 745-4490), in which it alleged that Jettall had terminated Pilot Andrew Thorpe because of his attempts to join the union. Jettall operates cargo flights in Canada and employs some 40 to 45 pilots.

Jettall denied these allegations, and attempts by an officer of the Board to assist the parties in settling the dispute were to no avail.

## II

### The Facts

The events that led to the lay off of Captains Taylor and Hopkins, and to the termination of Mr. Thorpe, as they were described to the Board, are set out below. These events were closely scrutinized by the Board, given the provisions of section 98(4) of the Code, that place the burden of proof on the employer, in similar matters.

### Captain John Taylor

Captain John Taylor began his employment as a pilot in early 1992. He was laid off as a pilot effective February 18, 1993, and he joined CALPA on February 21, 1993. Jettall submits that the decision to lay off John Taylor was made prior to February 16, 1993 and was largely based on administrative considerations.

According to Jettall, it all started in the summer of 1992, when Air Canada, in a notice dated July 22, 1992, indicated its intention to cancel the contract with Jettall for cargo transportation between Winnipeg and Thunder Bay, effective

September 20, 1992. The cancellation was delayed until January 9, 1993.

Mr. Taylor was one of the pilots based in Thunder Bay who were involved with this contract. The cancellation of the contract meant that sooner or later there would be no more work for Taylor, and by March 1, 1993, the number of pilots with Jetall had in effect been reduced to approximately 40.

Jettall never explained why Taylor had not been recalled to work, when the number of pilots was increased to 46, a few months later.

Captain Taylor contacted CALPA for the first time by phone on February 12, 1993. He had had previous talks with fellow pilots during a New Year's Eve party about organizing a union and was encouraged to start the drive. He was familiar with CALPA, having been a member since early 1990, while employed by Air Ontario. Captain Taylor wrote the document filed as document A3 on or about February 16, 1993 inviting fellow pilots to an organizational meeting scheduled to be held under CALPA's sponsorship on Saturday, February 20, 1993 at 9:00 a.m., in Toronto at the Swissotel, Terminal III.

When writing "I have put my job on the line", Captain Taylor indicates that his drive to bring in the union is well known to the pilot group as well as to Jettall management. Attendance at the CALPA meeting was poor and no more union organizing activity was reported.

A meeting was held on February 17, 1993, at around 4:00 p.m. between Mr. Cooper and Mr. Humble representing Jettall, and Mr. Earl Hopkins who testifies that he taped the conversation with a recording device, hidden in a pocket of his shirt. Mr. Cooper claims that the meeting taped by Mr. Hopkins was held one week later, February 24, 1993.

A very careful reading and analysis of the transcript of the discussion that took place leads this Board to believe that the meeting was held on February 17, 1993. This determination is based on the fact that Grey Cooper is talking about John Taylor as if he were still working for Jettall (he was dismissed on the 19) and as if the February 20 meeting was to take place in the future.

Captain Earl Hopkins

Captain Earl Hopkins began his employment as a captain in January of 1990 and had been a Training Captain since July 1, 1992. He was terminated as Training Captain on February 26, 1993 and he was laid off as pilot on March 15, 1993. He had joined CALPA on February 23, 1993. Captain Hopkins had not revealed his involvement with CALPA to his employer. He denies that he sponsored CALPA during the meeting of February 17 and later on signed a letter confirming his dedication to an anti-union position. He was absent at the organizational meeting of February 20.

Andrew Thorpe

Andrew Thorpe worked as a first officer and sometimes as a chief pilot for Jettall from November 15, 1989 until March 31, 1993 when he was terminated for the reasons described below.

At the time Mr. Thorpe was terminated, he had displayed an interest towards CALPA.

The circumstances surrounding this complaint took place in connection with Jettall's normal cargo operations and business activity. On March 19, 1993, after a flight from Mirabel to Hamilton, at around 9:40 p.m., Pilot Thorpe and a colleague , being released of their duty, had a few beers.

Complainant Thorpe then went his way from 11:30 p.m. until 2:00 a.m., when he showed up at Glanford Aviation Services Ltd. at the Hamilton airport. Kimberly Bezanson, a receptionist working the night shift at Glanford's desk, described him as being "in the bag". When asked at the hearing to explain what that expression meant, she plainly and without hesitation confirmed that the complainant smelled of alcohol and was apparently drunk. She gave him coffee, offered him a ride back to his hotel which he refused saying that he needed fresh air. He walked back to his hotel (2.2 km) at around 3:00 a.m.

Complainant Thorpe admitted that he was well aware of rules and regulations 2.3.1.3 of the company's Flight Operations Manual, and of section 409 of the Air Regulations concerning the consumption of alcohol and drugs. He also admitted that he had violated those rules on the night of March 19 to 20, 1993 in Hamilton. He also admitted that he resumed his pilot's duties at 11:00 a.m. that day without the required eight-hour resting period.

### III

#### The Law

The Code, sections 94(1)(a), 94(3)(a), (b), (c) and (e) and 96, states:

*"94. (1) No employer or person acting on behalf of an employer shall*

*(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; or*

...

*(3) No employer or person acting on behalf of an employer shall*

*(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with*

*respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person*

*(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,*

*(ii) has been expelled or suspended from membership in a trade union for a reason other than a failure to pay the periodic dues, assessments and initiation fees uniformly required to be paid by all members of the trade union as a condition of acquiring or retaining membership in the trade union,*

*(iii) has testified or otherwise participated or may testify or otherwise participate in a proceeding under this Part,*

*(iv) has made or is about to make a disclosure that the person may be required to make in a proceeding under this Part,*

*(v) has made an application or filed a complaint under this Part, or*

*(vi) has participated in a strike that is not prohibited by this Part or exercised any right under this Part;*

*(b) impose any condition in a contract of employment that restrains, or has the effect of restraining, an employee from exercising any right conferred on him by this Part;*

*(c) suspend, discharge or impose any financial or other penalty on an employee, or take any other disciplinary action against an employee, by reason of his refusal to perform all or some of the duties and responsibilities of another employee who is participating in a strike or subject to a lockout that is not prohibited by this Part;*

*(e) seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a financial or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of a trade union or to refrain from*

*(i) testifying or otherwise participating in a proceeding under this Part,*

*(ii) making a disclosure that the person may be required to make in a proceeding under this Part, or*

*(iii) making an application or filing a complaint under this Part;*

96. *No person shall seek by intimidation or coercion to compel a person to become or refrain from becoming or to cease to be a*

*member of a trade union."*

The law on the subject of discrimination against an employee for having exercised rights under the Code is well settled.

The employer must not be influenced in any way by an employee's actions when the employee exercises or is about to exercise his or her rights under the Code. In Yellowknife District Hospital Society et al. (1977), 20 di 281; and 77 CLLC 16,083 (CLRB no. 82):

*"... To give substance to the policy of the legislation and properly protect the employee's right, an employer must not be permitted to achieve a discriminatory objective because he coupled his discriminatory motive with other non-discriminatory reasons for his act.*

*For these reasons, if an employer acts out of anti-union animus even if it is an incidental reason, and his act is one contemplated by sections 184(3) (now 94(3)), he will be found to have committed an unfair labour practice."*

(pages 285 and 461)

The legislators saw fit to shift the burden of proof to employers when complaints alleging violations of section 94(3) are filed with the Board.

*"98. (4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party."*

#### Applicable Test

The applicable test is described extensively in National Pagette (1991), 85 di 1 (CLRB no. 862):

"When the Board examines the merits of an unfair labour practice complaint, particularly one involving dismissal, its role is very different from that of an arbitrator. The reasons for the decision to dismiss an employee are relevant only insofar as they reveal, through their nature, their occurrence in time, their severity or their impact, that the decision was motivated by anti-union animus. In discharging the reverse onus of proof imposed in section 98(4) of the Code, the employer must show that its reasons for dismissing an employee are in no way motivated by anti-union animus. Past Board decisions dealing with this subject are as abundant as they are unequivocal. It is appropriate to quote in extenso the following excerpt from *Air Atlantic Limited* (1986), 68 di 30; and 87 CLLC 16,002 (CLRB no. 600):

'The law on the subject of discrimination against employees for having exercised rights under the Code is well settled. If a decision by an employer to take any of the actions described in section 184(3)(a) against an employee has been influenced in any way by the fact that the employee has or is about to exercise rights under the Code, then the employer's actions will be found to be contrary to the Code. Anti-union motives need only be a proximate cause for an employer's conduct to run afoul of the Code.'

"... It is a rare experience for labour relations boards to hear an employer who cannot advance a justification for his act - e.g. failure to report to work one day, an act of insubordination to a superior, or merely a re-evaluation of the employee's performance which showed he did not maintain the standard desired. They may be proper motivations for employer actions but experience shows they are often relied upon around the time the employee is seeking to exercise or has exercised his right under section 110(1). To give substance to the policy of the legislation and properly protect the employee's right, an employer must not be permitted to achieve a discriminatory objective because he coupled his discriminatory motive with other non-discriminatory reasons for his act.

For these reasons, if an employer acts out of anti-union animus, even if it is an incidental reason, and his act is contemplated by section 184(3), he will be found to have committed an unfair labour practice."

(*Yellowknife District Hospital Society et al.* (1977), 20 di 281; and 77 CLLC 16,083 (CLRB no. 82), pages 284-285; and 461; emphasis added)

(pages 34-35; and 14,007; emphasis added)

In addition to this decision, see also *Larose-Paquette Autobus Inc.* (1990), 83 di 175 (CLRB no. 840), for other relevant references.

The framework for examining evidence presented by either party is therefore clear. The central question to be answered here is whether, based on the documentary and oral evidence, the reasons stated by the employer in its dismissal memo to Louise Arbour are absolutely the only reasons that entered into its decision, notwithstanding the question of whether they are,

otherwise, legitimate and valid."

(pages 9-10; emphasis added)

We refer also to Transport Papineau Inc. (1990), 83 di 185 (CLRB no. 842), where the Board discussed the concept of pretext versus real cause:

*"When examining the merits of a complaint of unfair labour practice, the Board must be satisfied that the employer has not taken actions to limit or impede the legitimate exercise by employees of the rights conferred by the Code. The employer's actions must not be motivated by anti-union animus, but must be for cause. This does not mean, however, that it is up to the Board to determine whether the reasons given by the employer to justify the action are valid, fair and commensurate with the seriousness of the alleged offence. The Board has no authority to determine whether the penalty imposed is commensurate with the alleged offence (see Services Ménagers Roy Ltée (1981), 43 di 212 (CLRB no. 308); and Pierre Fiset (1985), 55 di 233; and 85 CLLC 14,041 (CLRB no. 473)).*

*The Board however, can examine the nature of the cause alleged by the employer, not to assess its fairness or determine its validity having regard to the context in which it is alleged, but to determine whether it has the appearance of a pretext. This approach enables the Board to satisfy itself that this is indeed the real reason for the penalty and not an excuse or a pretext that masks anti-union animus..."*

(page 190; emphasis added)

In Jacques Lecavalier (1983), 54 di 100 (CLRB no. 443), the Board, in explaining the test, seemed to recognize that an employer with anti-union animus may be justified in dismissing an employee for other reasons:

*"The Board, as is well known, has consistently held, in interpreting the provisions of sections 184(3)(a)(i) to (vi) of the Code, that anti-union animus or motivation must be an essential element of any violation of these provisions. The Board must therefore determine whether, in dismissing the complainant, the employer was either motivated by anti-union animus or whether this motivation was also present if it were established that the employer claimed to have or in fact had just cause to dismiss the employee."*

(page 118; emphasis added)

However, it must be shown that those reasons do not include any anti-union animus:

*"... Foremost, the employer must establish that, whether or not there was just cause, its action was not tainted by anti-union animus. The union must establish that there was anti-union animus, again whether or not there was just cause."*

(Pierre Fiset (1985), 55 di 233; and 85 CLLC 16,041 (CLRB no. 473), at pages 242 and 14,268; emphasis added)

*"It is the policy of this Board in interpreting and applying section 184(3)(a) of the Code - as it is with most other boards across Canada - that the existence of an anti-union animus in the mixture of motives underlying the dismissal or termination makes such dismissal or termination contrary to the Code..."*

(A & M Transport Limited (1983), 52 di 69 (CLRB no. 422), page 86; affirmed by the Federal Court of Appeal in an unreported judgment (Court file A-1129-83))

The employer may be found to have anti-union animus either in a general way or towards a particular employee:

*"... In order for there to have been a violation of section 184(3)(a), one of the reasons for the dismissal must have been the union activities of the employees in general or the complainant in particular. This reason need not be the only one; it may be one of several reasons..."*

(Purolator Courier Limited (1982), 48 di 32 (CLRB no. 365), page 54)

The Board's determination as to the existence of anti-union animus must not be based on whether or not there is "just cause" for the employer's action since it is not within the Board's jurisdiction to do so:

*"It is only natural for an employer to submit evidence of cause or just cause when faced with a complaint of unfair practices surrounding the dismissal of an employee, or failure to recall an employee which amounts to a failure to continue to employ that*

*employee. The Board will hear this evidence not to rule on it but, we repeat, to make sure, in the exercise of its mandate, that this cause alleged by the employer is not associated with anti-union discrimination.*

*In other words, the Board is fully aware, and has stated this several times, that it does not have jurisdiction to determine rights disputes (within the meaning of labour relations) which can arise between parties when an employee has been dismissed whether there was just cause, cause or even no cause."*

(Verreault Navigation Inc. (1978), 24 di 227 (CLRB no. 134), page 288)

#### IV

##### The Findings

##### Mr. Taylor

The general trend of the discussion entertained by Grey Cooper during the February 17 meeting and involving Mr. Taylor clearly shows anti-union animus. The Board determines that the decision to lay off Captain Taylor was tainted with anti-union animus, even though it is also supported by administrative reasons and in spite of the fact that CALPA's organizational drive proved to be unsuccessful. Captain John Taylor was laid off as a pilot in violation of the Code and should be reinstated with the company as a pilot with no loss of rights and privileges.

The Board appoints Peter Suchanek, regional director for Ontario, or a person designated by him, to assist the parties in implementing this order.

The Board will remain seized of this matter as to be able to deal with any problems that may arise or to issue a formal order should such become necessary.

Mr. Hopkins

The termination of Captain Earl Hopkins' duties as training captain is a dismissal based on a strict interpretation of internal rules and even though the severity of that decision is obvious, it is not tainted with the anti-union animus that prevailed at the time. Captain Hopkins refused, apparently without reason, a job in Montréal on March 1 that triggered his lay off as a pilot, effective March 15, 1993. Captain Earl Hopkins was relieved of his duties as chief training pilot and was subsequently laid off as a pilot for administrative reasons not contrary to the Code. Even though his termination as a chief training officer occurred at a time where there was anti-union animus, the Board is satisfied that it did not taint the decision and that the termination was strictly based on administrative reasons.

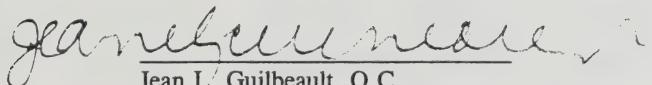
Mr. Thorpe

In the case of Mr. Thorpe, the Board is also satisfied that there was no violation of the Code.

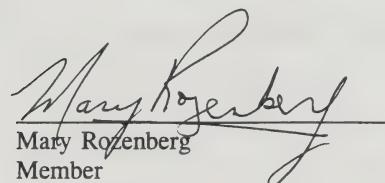
The decision to terminate Mr. Thorpe was made in the normal course of business based on well-known general rules applied in an objective manner. The Board is of the opinion that the complainant was dismissed for breach of a very serious duty and not for his union activities. The Board, after evaluating the strong evidence presented by the employer to refute the presumption under section 98(4), finds that the employer's decision to terminate pilot Andrew Thorpe was not tainted with anti-union animus motives but rather resulted from

the complainant's violation of fundamental air safety rules.

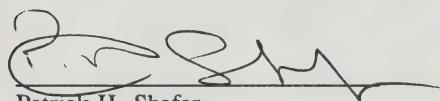
This is a unanimous decision of the Board.



Jean L. Guilbeault, Q.C.  
Vice-Chair



Marty Rozenberg  
Member



Patrick H. Shafer  
Member

ISSUED at Ottawa, this 7th day of February 1994.

CLRB / CCRT - 1051



CAI  
T100  
H52

# information

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## Summary

Northwest Territories Miners Association, applicant, Canadian Association of Smelter and Allied Workers, Local 4 (CASAW), bargaining agent, and Royal Oak Mines Inc., employer.

Board File: 555-3694

Decision No.: 1052

Application for certification pursuant to section 24 of the Canada Labour Code (Part I - Industrial Relations) for a unit currently represented by the Canadian Association of Smelter and Allied Workers, Local 4, at Royal Oak Mines Inc.

At issue is whether the raid application has been brought within the time period contemplated by section 24(2)(c) and whether or not a collective agreement covering the employees affected was in operation at all times material to the application.

The Board finds that the union's acceptance of the employer's offer, which was made in compliance with the Board's remedial order in a previous Board decision, established a three-year collective agreement within the meaning of the Code. The application for certification is therefore untimely and is consequently dismissed.

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## Résumé

Northwest Territories Miners Association, requérante, Association canadienne des travailleurs de fonderie et ouvriers assimilés, section locale 4 (CASAW), agent négociateur, et Royal Oak Mines Inc., employeur.

Dossier du Conseil: 555-3694

Décision n° 1052

Demande d'accréditation présentée en vertu de l'article 24 du Code canadien du travail (Partie I - Relations du travail) à l'égard d'une unité d'employés de Royal Oak Mines Inc. représentée à l'heure actuelle par l'Association canadienne des travailleurs de fonderie et ouvriers assimilés, section locale 4.

Il s'agit en l'espèce de déterminer si la demande de maraudage a été présentée dans les délais prévus par l'alinéa 24(2)c) et si une convention collective régissant les employés concernés était en vigueur pendant les périodes visées par la demande.

Le Conseil juge que, étant donné que le syndicat a accepté l'offre de l'employeur, qui a été faite en conformité avec l'ordonnance de redressement du Conseil dans une autre décision, il y a convention collective d'une durée de trois ans au sens du Code. La demande d'accréditation n'a donc pas été présentée dans les délais et est par conséquent rejetée.



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Board  
  
Conseil  
Canadien des  
Relations du  
Travail

Reasons for decision

Northwest Territories Miners Association,

applicant,

and

Canadian Association of Smelter and Allied Workers, Local 4 (CASAW),

bargaining agent,

and

Royal Oak Mines Inc.,

employer.

Board file: 555-3694

---

The Board was comprised of Mr. J.F.W. Weatherill, Chairman, and Mr. Michael Eayrs and Ms. Mary Rozenberg, Members.

Appearances (on record):

Messrs. Robert Hopson and Nick Luzny, for the applicant; Mr. Bill Heath, for the employer; and Ms. Gina Fiorillo, for the Canadian Association of Smelter and Allied Workers, Local 4.

This is an application for certification, dated December 8, 1993, and received by the Board on December 9, 1993. The unit of employees in respect of which certification is sought is described as "Hourly Workers, Royal Oak Mines Inc., Yellowknife, NWT". This unit is, in substance, a unit for which an incumbent trade union, Canadian Association of Smelter and Allied Workers, Local 4 (CASAW), currently holds bargaining rights.

In the application it is asserted, correctly, that there was a collective agreement in effect, covering employees affected by this application, from April 1, 1989 until March 31, 1992. Having regard to the circumstances which

will be set out below, the Board held in abeyance its usual investigation in a matter of this sort, and requested the parties - the applicant, the incumbent trade union and the employer - to make representations to the Board on the question of the timeliness of the application. Such representations were made by all parties and the Board, after consideration of the matter, concluded that there was a collective agreement in effect at the material times and that the application was untimely. The application for certification was accordingly dismissed. We now set out our reasons for that decision. Having regard to the disposition made of the case, the Board has not addressed the question of the status of the applicant organization.

The matter of the timeliness of the present application is governed by section 24 of the Canada Labour Code, and in particular by section 24(2)(c). This section provides as follows:

"24. (2) Subject to subsection (3), an application by a trade union for certification as the bargaining agent for a unit may be made

...

(c) where a collective agreement applicable to the unit is in force and is for a term of not more than three years, only after the commencement of the last three months of its operation; ... "

In the instant case, the issue to be determined in respect of the timeliness of the application is simply whether or not a collective agreement was in effect at the time the present application was made, it being clear that if such agreement is in force, the present application has not been made within the "open period" described in section 24(2)(c).

Following the expiry, on March 31 1992, of a collective agreement between the employer and the incumbent trade union, CASAW, which covered all or substantially all of the employees affected by this application, negotiations took place with a view to entering into a new collective agreement, but these negotiations did not succeed, and a lengthy lockout and strike took place. Various applications were made to the Board in respect of matters relating to this situation, including an application (Board file 745-4513) alleging failure on the part of the employer to bargain in good faith, contrary to section 50(a) of the Code. After lengthy hearings, the Board found that the employer was in breach of section 50(a) of the Code, and in the exercise of its remedial powers under section 99(2) of the Code, the Board ordered the employer to present the incumbent union with a formal offer of a collective agreement. The terms of that offer are described in the Board's Order which is set out in Royal Oak Mines Inc. (1993), as yet unreported CLRB decision no. 1037, dated November 11, 1993. Under the terms of the Order, it was open to the incumbent union to accept that offer in its entirety by midnight, November 16, 1993. It is not contested that the offer was accepted.

In our view the acceptance of that offer established a collective agreement with a three-year term commencing November 16, 1993, the date of ratification. It is clear from the terms of the Board's Order that what the employer was directed to offer to the union, and the union entitled to accept within a certain period, was a collective agreement within the meaning of the Code. The acceptance procedure is described in the Order as one of "ratification" and the Order refers more than once to events to occur following "ratification of the new

collective agreement".

It is true that the Board's Order did not set out in detail all of the terms of the agreement it required to be offered. With respect to four specific matters, the parties were directed to negotiate. It is argued by the applicant and the employer that the agreement was therefore "incomplete" and not a true collective agreement within the meaning of the Code. In our view, however, the agreement set out in the Board's Order comes clearly within the scope of the expression "collective agreement", as defined as follows by section 3(1) of the Code.

*"'collective agreement' means an agreement in writing entered into between an employer and a bargaining agent containing provisions respecting terms and conditions of employment and related matters."*

In any event, the provision for negotiation of the four matters in question was not an open-ended one. It was a requirement of the Order that if any or all of such matters remained unresolved after 30 calendar days from receipt of the Order (delivered on November 11, 1993) they were referred to the mediators/arbitrators named in the agreement for a process which would lead to the final determination of those issues. All terms of the collective agreement were, therefore, clearly and finally determinable.

Section 16(p) of the Code includes the following:

*"16. The Board has, in relation to any proceeding before it, power*

*...*

*(p) to decide for all purposes of this Part any question that may arise in the proceeding, including, without restricting the generality*

of the foregoing, any question as to whether

...

(vi) a collective agreement has been entered into,

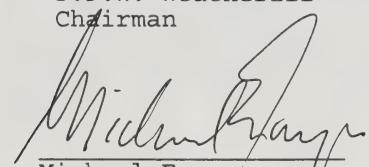
(vii) any person or organization is a party to or bound by a collective agreement, and

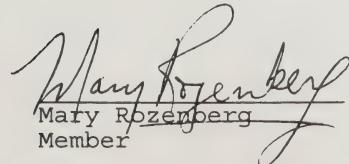
(viii) a collective agreement is in operation."

In the exercise of that power, and for all of the reasons set out above, the Board finds that, at all times material to the present application, the collective agreement entered into is in operation, binding the employer, the incumbent trade union and the employees in the bargaining unit.

Accordingly, it must be concluded that this application has not been brought within a period contemplated by the Code, and it is therefore dismissed.

  
J.F.W. Weatherill  
Chairman

  
Michael Eayrs  
Member

  
Mary Rozemberg  
Member

ISSUED at Ottawa, this 31st day of January 1994.

CLRB/CCRT - 1052



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## Summary

Independent Canadian Transit Union, Local 1,  
*complainant*, and Brink's Canada Limited,  
*respondent*.

Board File: 745-4691  
CLRB/CCRT Decision no. 1053  
April 15, 1994

## Résumé

Syndicat canadien indépendant du transport,  
section locale 1, *plaignant*, et Brink's of  
Canada Limited, *employeur*.

Dossier du Conseil: 745-4691  
CLRB/CCRT Décision n° 1053  
le 15 avril 1994

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The Board finds the employer's insistence in negotiating two separate collective agreements within a single Board certified unit to constitute a breach of section 50 of the Canada Labour Code (Part I - Industrial Relations).

Le Conseil estime que le fait que l'employeur insiste sur la négociation de deux conventions collectives distinctes régissant les employés d'une seule unité accréditée par le Conseil constitue une violation de l'article 50 du Code canadien du travail (Partie I - Relations du travail).



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## Reasons for decision

Independent Canadian Transit Union, Local 1,  
*complainant,*  
*and*  
Brink's Canada Limited,  
*respondent.*

Board File: 745-4691  
Decision no. 1053  
April 15, 1994

---

The Board was composed of Messrs. Richard I. Hornung, Q.C., Vice-Chairman, and Mr. Calvin B. Davis and Ms. Mary Rozenberg, Members. A hearing was held in Vancouver on April 5-6, 1994.

### Appearances

Mr. G. James Baugh for the complainant; and  
Mr. Michael W. Hunter for the respondent.

These reasons for decision were written by Mr. Richard I. Hornung, Q.C., Vice-Chairman.

### I

On March 30, 1992, the Board certified IWA-Canada, CLC, Local Union Number I-217 to represent:

*"all employees of Brink's Canada Limited employed in British Columbia, excluding office and sales staff and those above."*

The employees affected, while covered by a single certification order, became subject to two separate collective agreements. Each had a different expiry date. The Vancouver-Victoria employees were covered by an agreement that expired on January 31, 1993, while the Kelowna-Kamloops employees operated under a collective agreement that does not expire until November 8, 1994.

On January 11, 1993, the Independent Canadian Transit Union (ICTU or the "union") brought a raid application pursuant to section 24 to represent the employees in the unit. The Board allowed the application and ordered a representation vote. Following the conduct of the vote, the Board, on April 8, 1993, certified ICTU as the bargaining representative of the employees in the unit described above.

On June 14, 1993, the union wrote to the employer invoking section 36(2) of the Code and giving notice of its intention to commence negotiations with respect to collective agreements that applied to both Kelowna-Kamloops, and Vancouver-Victoria (Exhibit 11).

In the ensuing negotiations, the employer steadfastly insisted that two collective agreements must be negotiated: one for Vancouver-Victoria and one for Kelowna-Kamloops. In defence of this position the employer stated that it was simply maintaining the status-quo.

The union, on the other hand, took the position that the collective agreement covering the Kamloops-Kelowna employees is null and void and that those employees were governed by the terms and conditions contained in the Victoria-Vancouver agreement. We do not agree with the argument of the union that because of the relative expiration dates the provisions of the Vancouver-Victoria agreement automatically apply to the entire unit.

There is no need for the Board to address the union's position at length. It suffices to point out that in its earlier determination (Brink's Canada Limited, (1993), as yet unreported decision no. 1005), the Board stated at page 6:

*"In the present case, neither of the collective agreements entered into between the employer and the intervenor is, in the language of the statute, 'applicable to the unit'. ..."*

The union's request, therefore, for a declaration that the Vancouver-Victoria agreement applies to the bargaining unit as a whole is denied.

The employer's argument that two separate collective agreements must be negotiated for the single certified unit to maintain the status-quo is untenable. The Board's position in this regard has been unequivocal:

*"... In looking at the Code, it is clear to us that a certification implies a single collective agreement; that parties cannot negotiate more than one collective agreement where there is a single certification order..."*

(Alberta Government Telephones Commission (1991), 76 di 172 (CLRB no. 726) at page 184)

Therefore, the parties are clearly required to negotiate a single collective agreement applicable to the entire unit for which the certification order issued.

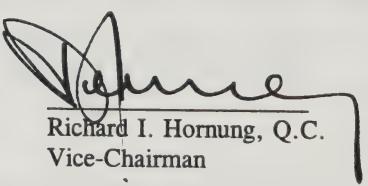
The Board concludes that the employer's continued insistence on negotiating two separate collective agreements for the single Board certified unit constitutes a breach of section 50(a) of the Code.

The Board orders:

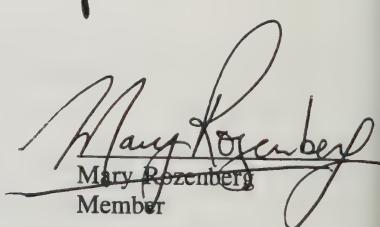
1. that the employer, or its authorized representative on its behalf, immediately meet with the union and commence to bargain collectively in good faith; and
2. that the employer make every reasonable effort to enter into a collective agreement that will apply to the entire bargaining unit certified by the Board.

The Board further declares:

3. for the purposes of section 50(b) of the Code, the terms and conditions of employment provided in the collective agreements for Vancouver-Victoria and Kelowna-Kamloops apply to the employees presently affected by those agreements; and
4. the notice to bargain given by the union on June 14, 1993 constitutes a valid notice to bargain with respect to the bargaining unit as a whole and that the said notice constitutes compliance with section 50 of the Code.

  
Richard I. Hornung, Q.C.  
Vice-Chairman

  
Calvin B. Davis  
Member

  
Mary Rosenberg  
Member

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## Summary

James T. Bennett, complainant, and  
Transportation - Communications  
International Union, respondent, and  
Canadian Pacific Express and  
Transport Ltd., employer.

Board files: 745-4556  
745-4536

Decision No.: 1054

## Résumé

James T. Bennett, plaignant, et  
Syndicat international du transport-  
communications, intimé, et Canadien  
Pacifique Express et Transport Ltée,  
employeur.

Dossiers du Conseil: 745-4556  
745-4536

Décision n° 1054

This decision deals with two  
complaints filed by James Bennett  
alleging that his union violated the  
provisions of section 37 of the  
Canada Labour Code concerning the  
duty of fair representation as well as  
sections 95(i)(i) and (iii).

At the commencement of the  
hearing, the union questioned the  
timeliness of both complaints  
pursuant to section 97(2) of the  
Code.

The Board referred to a similar case  
of the Supreme Court and found that  
in these particular complaints there is  
a series of rebuffs and re-  
examinations of Mr. Bennett's  
original grievance.

Even if the union took subsequent  
actions on behalf of Mr. Bennett, the  
union's refusal to proceed on these  
actions does not make Mr. Bennett's  
complaints timely. The union  
previously made it quite clear that  
they were not prepared to proceed  
with his grievance.

The two complaints were dismissed  
as untimely.

Les présents motifs de décision font  
suite à deux plaintes déposées par  
James Bennett à l'égard de son  
syndicat. M. Bennett prétend que  
son syndicat a violé les dispositions  
de l'article 37 du Code canadien du  
travail concernant le devoir de  
représentation juste, ainsi que les  
dispositions des sous-alinéas 95i)(i)  
et (iii) du Code.

Au début de l'audience, le syndicat a  
soulevé la question du délai prévu au  
paragraphe 97(2), relativement aux  
deux plaintes.

Le Conseil fait référence à un  
jugement de la Cour suprême portant  
sur une question semblable et conclut  
que ces plaintes sont suite à une série  
de rebuffades et de réexamens du  
grief initial de M. Bennett.

Même si le syndicat a entrepris des  
démarches au nom de M. Bennett, le  
fait qu'il ait refusé de donner suite à  
ces mesures n'influe pas sur la  
question du délai. Le syndicat avait  
déjà indiqué très clairement qu'il  
n'avait pas l'intention de donner  
suite au grief.

Les deux plaintes sont donc rejetées  
parce qu'elles n'ont pas été déposées  
dans les délais prescrits.

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**LES MOTIFS DE DÉCISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW**

Reasons for decision

James T. Bennett,

*complainant,*

and

Transportation - Communications  
International Union,

*respondent,*

and

Canadian Pacific Express and  
Transport Ltd.,

*employer.*

Board Files: 745-4556  
745-4536

---

The Board was composed of Mr. Jean L. Guilbeault, Vice-Chair, and Messrs. Calvin B. Davis and Micheal Eayrs, Members.

Appearances

Mr. Edward J. Posliff, for the complainant; and

Mr. Michael A. Church, for the respondent; and

Mr. Michael D. Failes, for the Canadian Pacific Express and Transport Ltd., employer.

These reasons for decision were written by Mr. Calvin B. Davis, Member.

These reasons deal with two complaints filed by Mr. James T. Bennett against his union, the Transportation - Communications International Union. One complaint is filed under the duty of fair representation provisions contained in section 37 of the Canada Labour Code (Part I - Industrial Relations). The other complaint alleges violation of sections 95(i)(i) and (iii) of the Code.

The relevant provisions of the Code read as follow:

"37. A trade union or representative of a trade

union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.

...

95. No trade union or person acting on behalf of a trade union shall

...

(i) discriminate against a person with respect to employment, a term or condition of employment or membership in a trade union, or intimidate or coerce a person or impose a financial or other penalty on a person, because that person

(ii) has testified or otherwise participated or may testify or otherwise participate in a proceeding under this Part,

...

(iii) has made an application or filed a complaint under this Part."

A hearing was held at Windsor on November 30, 1993. At the commencement of the hearing, the union questioned the timeliness of both complaints pursuant to section 97(2) of the Code. The Board heard evidence and argument on the timeliness issue.

"97. (2) Subject to subsections (3) to (5), a complaint pursuant to subsection (1) shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint."

On March 2, 1988, Mr. Bennett was hired as a warehouseman/part-time driver with Canadian Pacific Express and Transport Ltd. (CPET), working out of the Oshawa, Ontario terminal. He resigned on December 19, 1990. On March 12, 1991, he was rehired to once again work out of Oshawa as a warehouseman. On December 2, 1991 he was dismissed from this job.

He was able to once more gain employment with CPET. This time he worked part-time out of the Windsor terminal. On

May 12, 1992, the employer dismissed him for allegedly not being available for work, and for not having fulfilled the requirements of the probationary period.

The union filed a grievance on Mr. Bennett's behalf on June 5, 1992. At the time, the union was under the impression that Mr. Bennett had worked continuously for the employer, in various locations since 1988. The union questioned the probationary aspect of the dismissal and the denial of Mr. Bennett's seniority. In a letter dated June 18, 1992, the employer denied the grievance.

The union commenced a follow-up investigation to the dismissal, and came to the conclusion that Mr. Bennett did not have a valid grievance. It came to the conclusion that he had been dismissed for not being available for work. As he was still on probation, the employer was within its rights to terminate him. On July 23, 1992, the union informed Mr. Bennett that his grievance was not valid. The union also informed Mr. Bennett that he had the right to appeal its decision pursuant to the union constitution.

Even though the union had decided not to proceed with the grievance, another meeting was held with the employer on October 15, 1992 to review Mr. Bennett's file. The employer reiterated that Mr. Bennett had been terminated for just cause since he had been unavailable for work when required and that they were not prepared to reconsider the termination. On November 20, 1992, the union wrote to Mr. Bennett to advise him that his file was closed since they believed he had been terminated for not being available for work.

On January 25, 1993, Mr. Bennett was advised that the union once again reviewed his file. A review committee of the

union had gone over the file from day one and decided that the issue of his dismissal during his probationary period in Windsor still did not constitute a valid grievance. The committee did decide however that there was the question of a junior employee having been hired at Windsor.

The union had further meetings with the employer dealing with Mr. Bennett's claims of monies owed to him. The employer denied that any further money was owing.

On April 5, 1993, the union representative, Mr. Bechtel, wrote counsel for Mr. Bennett informing him that the union's position had not changed. Mr. Bennett was a probationary employee who had worked less than 520 hours. Thus, under article 6.2.4 of the collective agreement, the Company could dismiss him because he was a probationary employee.

Mr. Bennett filed his duty of fair representation complaint with the Board on June 14, 1993. His complaint alleging violation of sections 95(i)(i) and (iii) of the Code was filed July 13, 1993.

When dealing with complaints under sections 24(4), 37, 50, 69, 94, 95 or 96 of the Code, the Board must assure itself that the complaint has been filed within the 90-day time limit provided in section 97(2) of the Code.

In Upper Lakes Shipping Ltd. v. Mike Sheehan et al., [1979] 1 S.C.R. 902, the Supreme Court of Canada said the following:

"A complainant is entitled to the advantage and is subject to the limitation of the ninety day period under s. 187(2) [now s. 97(2)]. It can neither be restricted to a lesser period by any direction of the Board nor be allowed a greater period."

As one can readily see, the Board has no discretion when dealing with timeliness.

What the Board has in these particular complaints is a series of rebuffs and re-examinations of Mr. Bennett's original complaint. This is similar to the case which the Supreme Court had before it in Upper Lakes Shipping, supra, where the Court had the following to say:

"It is contended, however, that one rebuff or a succession of rebuffs does not make subsequent applications for employment untimely so long as a complaint is filed within ninety days of the latest rebuff. The Board rejected this contention in the following words:

'Having now heard the evidence, the Board is satisfied that the complaint of Mr. Sheehan is indeed untimely in that the incidents complained of cannot, in the circumstances, be considered separately and are no more than the continuation of a situation which had arisen in the early 1960's and which has remained substantially unchanged.'

The Federal Court of Appeal took an opposite view, that of counsel for Sheehan, speaking through Urie J.A. as follows:

'With great respect, I am of the opinion that the Board was in error in so finding. In the first place since the prohibitions embodied in section 184 did not come into force until March 1973, there could not have been an offence committed contrary thereto until after that date. Thus, in my view, what had happened before that date could have no possible bearing on a violation of the prohibition committed thereafter. If what was done after the enactment of the statute was an offence the fact that exactly the same thing could have been done before its enactment with impunity, does not make it any less a violation of the statute. Moreover, clearly, in my view each request for employment and refusal, if in breach of section 184 might have become the subject of a complaint. Since, in this case, the complaint was made on May 23, 1974 in respect of the alleged refusals to employ the Applicant on April 26, 1974 and May 3, 1974, it was not untimely and the Board erred in finding that it was.'

I do not disagree with the Federal Court of Appeal that it was appropriate to measure the timeliness of a complaint from March 1, 1973 when the subject matter thereof became a prohibited practice. However, I cannot agree that there can be any number of requests and refusals, relating to the same circumstances, to enable a complainant to found a succession of complaints under s. 187(1) so long as he takes care to bring

them successively within ninety days of any request and refusal. That would make a mockery of s. 187(2), even if it was applicable irrespective of res judicata, which was not mentioned by the Federal Court of Appeal."

(pages 907-908; emphasis added)

Thus, to be timely, Mr. Bennett would have had to file his complaint within 90 days of having received the union's letter dated July 23, 1992. Mr. Bennett agrees he was copied with this letter:

"A-09-23-92

July 23, 1992

Sharon Banks,  
c/o CP Express and Transport,  
227 Eugenie Street,  
Windsor, Ontario,  
N8X 2X8

Dear Madam:

In regard to the above file re employee J. Bennett, Windsor, Ontario.

Enclosed is a copy of company reply in which I cannot argue with.

It appears he also worked with other Companies at the same time, also I understand he started with Windsor Terminal, as a new employee which makes the situation I can not go on his service in other CPET Terminals.

For the above reasons, In my opinion, a grievance does not exist, therefore, I am respectfully closing the file.

The employee does have the right to appeal if he has something I can go on that I haven't already received.

Yours fraternally,

(Signed)

J. Bechtel,  
Vice-President  
Trucking Division

JB:VB

ENCL:

REGISTERED

c.c. J. Bennett, 1448 Front Road S.,  
Amherstburg, Ont., N9V 2M8

c.c. Robin"

Mr. Bennett did not file his complaint within 90 days of

receiving the above letter. Unfortunately, that means he is out of time. As can be seen from the above letter, Mr. Bennett had a right to appeal the decision made by the union representative. Even if some of the subsequent actions taken by the union could be construed as an appeal (such as the meeting of the union's review committee on January 25, 1993) the complaint is still untimely .

In Donald McIntyre (1987), 72 di 127; 19 CLRBR (NS) 196; and 88 CLLC 16,002 (CLRB no. 665), the Board had the following to say regarding timeliness and a union's internal appeal process:

*"This decision of the Board is based on the premise that internal union appeal procedures which flow from a union's constitution and which are not available to non-members or to members who have temporarily lost their good standing as members are not normally reviewable by this Board under section 136.1 [now section 37] of the Code. In circumstances like we have here, where a trade union decides not to proceed with a member's grievance and where the member decides to have that decision reviewed through an internal union appeal mechanism, that member must, if he or she thinks there has been a violation of the Code, file a complaint with the Board within 90 days from the date he knew of the union's decision not to proceed for the complaint to be timely under section 187(2) [now section 97(2) of the Code]. The union member cannot wait until the internal union review mechanisms have been exhausted before a complaint is filed with the Board. The rationale for these restrictions on bringing this type of complaint to the Board under section 136.1 [now section 37] can be found in George Lochner (1979), 38 di 228; and [1980] 1 Can LRB 149; AND 79 CLLC 16,209 (CLRB no. 219); and Andrew J. Startek (1979), 38 di 228; and [1980] 1 Can LRBR 577 (CLRB no. 227)."*

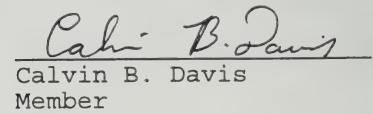
(pages 129-130; 199; and 14,004-14,005)

By filing his section 37 complaint on June 14, 1993, Mr. Bennett is well outside the time limits. The Board is also unable to deal with the complaint under sections 95(i)(i) and (iii) of the Code as it would have to have been filed within 90 days of July 23, 1992.

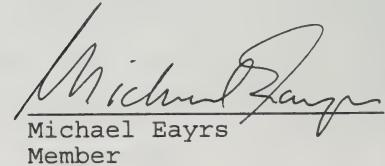
In conclusion the two complaints are dismissed as untimely.



Jean L. Guilbeault  
Vice-Chair



Calvin B. Davis  
Member



Michael Eayrs  
Member

ISSUED at Ottawa, this 9th day of February 1994.

CLRB/CCRT - 1054

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## SUMMARY

British Columbia Terminal Elevator Operators' Association, on behalf of Saskatchewan Wheat Pool, applicant, and Grain Workers' Union, Local 333 (C.L.C.), respondent.

Board File: 725-335

Decision No.: 1055

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## RÉSUMÉ

British Columbia Terminal Elevator Operators' Association, au nom de Saskatchewan Wheat Pool, requérante, et Grain Workers' Union, section locale 333 (C.T.C.), syndicat intimé.

Dossier du Conseil: 725-335

Décision n°: 1055

---

Strike - Definition - Interpretation of "work" in the definition of strike - Union alleges that insofar as collective agreement stipulates that overtime work is "voluntary," the Board is precluded from finding that the refusal to work overtime constitutes an unlawful strike. - The Board reviewed its previous jurisprudence and rejected the union's argument on the basis that a concerted refusal by employees to work overtime, which they had previously worked in the normal course of the employer's business, constitutes a strike regardless of the parties' agreement concerning its voluntary or involuntary character.

Strike - Statutory definition of "strike" cannot be changed by agreement of the parties nor can the public purpose of industrial peace behind the unlawful strike provisions be avoided by "contracting out" of the legal obligations of the Code.

Procedure - The union argued that the Board did not have jurisdiction to issue an order directed at the employees because they had not been individually either named in the application or notified of the hearing. The Board referred to section 34(6) of its Regulations and rejected the union's argument. - A reading of sections 34(1)(b) and 34(6) makes it clear that service on specific employees will only be required where an applicable order is sought with respect to those employees. Where no such order is sought, service on the union will suffice.

Définition de «grève» - Interprétation de «travail» dans le contexte d'une grève - D'après le syndicat, le Conseil ne peut conclure que le refus d'effectuer des heures supplémentaires constitue une grève illégale puisqu'aux termes de la convention collective, le surtemps est «facultatif». - Le Conseil passe en revue sa jurisprudence et rejette cet argument du syndicat. Selon le Conseil, le refus concerté de faire du surtemps, qui faisait auparavant partie des activités normales de l'employeur, constitue une grève, même si les parties s'entendent sur le caractère facultatif ou obligatoire de ce travail.

Grève - La définition de «grève» énoncée dans le Code ne peut être modifiée par les parties, et celles-ci ne peuvent invoquer les dispositions d'une convention collective pour contourner l'objectif de paix industrielle qui vise à assurer l'interdiction de déclencher une grève illégale.

Procédure - Le syndicat estime que le Conseil ne peut émettre une ordonnance visant les employés puisque ceux-ci n'étaient pas individuellement nommés dans la demande et n'avaient pas reçu d'avis d'audience. Le Conseil se réfère au paragraphe 34(6) du Règlement et rejette l'argument du syndicat. L'alinéa 34(1)b) et le paragraphe 34(6) du Règlement indiquent clairement que la signification à des employés particuliers ne s'impose que si une ordonnance est nommément demandée à l'égard de ces employés. Autrement, il suffit d'aviser le syndicat.

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LES MOTIFS DE DECISION DU CCRT SONT  
MAINTENANT ACCESSIBLES DANS QUICKLAW.

Canada  
Labour  
Relations  
Board

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Conseil  
Canadien des  
Relations du  
Travail

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Reasons for decision

British Columbia Terminal  
Elevator Operators' Association,  
on behalf of Saskatchewan Wheat  
Pool,

applicant,

and

Grain Workers' Union, Local 333,  
C.L.C.,

respondent.

Board File: 725-335

---

The Board:

Mr. Richard I. Hornung Q.C., Vice-Chair; Messrs. Calvin B.  
Davis and Michael Eayrs, Members.

Appearances

Messrs. R. Alan Francis and Eric J. Harris, for the  
applicant;

Mr. David L. Blair, for the respondent.

Reasons:

Mr. Richard I. Hornung Q.C., Vice-Chair.

I

On October 21, 1993, the Board heard an application filed by the British Columbia Terminal Elevator Operators' Association, on behalf of Saskatchewan Wheat Pool (hereinafter the "employer" or the "BCTEOA"), pursuant to section 91(1) of the Canada Labour Code, seeking a declaration of unlawful strike, as well as an order directing the Grain Workers' Union (hereinafter the union) to revoke the declaration or authorization to strike and enjoining the employees from participating in the said strike.

The alleged strike consisted of a concerted refusal by the employees to work overtime.

After hearing the evidence, the Board determined that section 89 of the Code had been violated and issued the following order:

"Board File: 725-335

**IN THE MATTER OF THE**

**Canada Labour Code**

- and -

**The B.C. Terminal Elevator Operators' Association on behalf of Saskatchewan Wheat Pool**

applicant,

- and -

**Grain Workers' Union, Local 333, C.L.C.**

respondent.

**WHEREAS**, on October 15, 1993, the Canada Labour Relations Board received an application from the applicant pursuant to section 91 of the Canada Labour Code alleging that the respondent and its members are participating in an unlawful strike;

AND WHEREAS, Section 3(1) of the Code provides that a strike includes a cessation of work or a refusal to work or to continue to work by employees, in combination, in concert or in accordance with a common understanding, and a slowdown of work or other concerted activity on the part of employees in relation to their work that is designed to restrict or limit output;

AND WHEREAS, following the hearing of evidence and argument on October 21, 1993, the Board concluded that the respondent union has adopted a policy with respect to the refusal of its members to provide overtime work which amounts to a concerted activity on the part of the said members in relation to their work that is designed to restrict or limit output.

AND WHEREAS, the Board has concluded that employees are following this policy and have and are refusing to make themselves available for overtime work since October 1st, 1993;

AND WHEREAS, the Board is satisfied that these actions constitute a strike contrary to section 89 of the Code;

AND WHEREAS, the parties have agreed that notwithstanding the terms hereof, an employee shall not be in breach of this order by refusing overtime work offered in a manner inconsistent with the practice for allocation of overtime that existed at the Saskatchewan Wheat Pool Terminal prior to February 1, 1993.

NOW THEREFORE, the Canada Labour Relations Board hereby orders the respondent union and employees represented by it to cease and desist from participating in the said unlawful activity;

AND IT IS FURTHER ORDERED that the respondent union communicate this Order to all employees who are affected by it.

THIS ORDER is made pursuant to the provisions of section 91 of the Code and shall remain in full force and effect until the provisions of section 89 of the Code have been satisfied unless it is modified or revoked pursuant to an application under section 93 of the Code.

ISSUED AT VANCOUVER, this 22nd day of October 1993.

Richard I. Hornung, Q.C.  
Vice-Chairman"

In a letter accompanying that order, the Board advised the parties of its intention to issue reasons for decision at a later date. These are the reasons.

## II

The relevant sections of the Code read as follows:

"3. (1) In this Part,

...

'strike' includes a cessation of work or a refusal to work or to continue to work by employees, in combination, in concert or in accordance with a common understanding, and a slowdown of work or other concerted activity on the part of employees in relation to their work that is designed to restrict or limit output;

...

89.(1) No employer shall declare or cause a lockout and no trade union shall declare or authorize a strike unless

(a) the employer or trade union has given notice to bargain collectively under this Part;

(b) the employer and the trade union

(i) have failed to bargain collectively within the period specified in paragraph 50(a), or

(ii) have bargained collectively in accordance with section 50 but have failed to enter into or revise a collective agreement;

(c) the Minister has

(i) received a notice, given under section 71 by either party to the dispute, informing him of the failure of the parties to enter into or revise a collective agreement, or

(ii) taken action under subsection 72(2); and

(d) seven days have elapsed after the date on which the Minister

(i) notified the parties of his intention not to appoint a conciliation officer or conciliation commissioner or to establish a conciliation board under subsection 72(1),

(ii) notified the parties of his intention not to appoint a conciliation commissioner or to establish a conciliation board under section 74, or

(iii) released a copy of the report of a conciliation commissioner or conciliation board to the parties to the dispute pursuant to paragraph 78(a).

(2) No employee shall participate in a strike unless

(a) the employee is a member of a bargaining unit in respect of which a notice to bargain collectively has been given under this Part; and

(b) the requirements of subsection (1) have been met in respect of the bargaining unit of which the employee is a member.

...

91.(1) Where an employer alleges that a trade union has declared or authorized a strike, or that employees have participated, are participating or are likely to participate in a strike, the effect of which was, is or would be to involve the participation of an employee in a strike in contravention of this Part, the employer may apply to the Board for a declaration that the strike was, is or would be unlawful.

(2) Where an employer applies to the Board under subsection (1) for a declaration that a strike was, is or would be unlawful, the Board may, after affording the trade union or employees referred to in subsection (1) an opportunity to be heard on the application, make such a declaration and, if the employer so requests, may make an order

(a) requiring the trade union to revoke the declaration or authorization to strike and to give notice of such revocation forthwith to the employees to whom it was directed;

(b) enjoining any employee from participating in the strike;

(c) requiring any employee who is participating in the strike to perform the duties of his employment; and

(d) requiring any trade union, of which any employee with respect to whom an order is made under paragraph (b) or (c) is a member, and any officer or representative of that union, forthwith to give notice of any order made under paragraph (b) or (c) to any employee to whom it applies.

...

93. (1) An order made under section 91 or 92

(a) shall be in such terms as the Board considers necessary and sufficient to meet the circumstances of the case; and

(b) subject to subsection (2), shall have effect for such time as is specified in the order.

(2) Where the Board makes an order under section 91 or 92, the Board may, from time to time on application by the employer or trade union that requested the order or any employer, trade union, employee or other person affected thereby, notice of which application has been given to the parties named in the order, by supplementary order,

(a) continue the order, with or without modification, for such period as is stated in the supplementary order; or

(b) revoke the order."

III

As a preliminary matter, the union argued that the Board did not have jurisdiction to issue an order directed at the employees because they had not been individually

either named in the application or notified of the hearing. In this regard, the union relied on section 34(1)(b) of the Board's Regulations, which states:

"34.(1) An application by an employer for a declaration of an unlawful strike under subsection 91(1) of the Act shall contain:

...

(b) the name, address and telephone number of any trade union and, if applicable, any employee against whom an order is specifically sought, to be referred to as the respondents; ..."

It is a well-known principle that the union is the exclusive representative of the employees in a bargaining unit (Syndicat catholique des employés de magasins de Québec Inc. v. Compagnie Paquet Ltée, [1959] S.C.R. 206, page 212; and Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509; (1984), 9 D.L.R. (4th) 641; and 84 CLLC 14,043, pages 526-527; 654; and 12,188). To underscore that reality, particularly in cases such as this one, the Board included in its Regulations the following provision:

"34.(6) Service on the bargaining agent or one of its officers of notice of an application are referred to in subsection (1) or notice of a hearing in respect of the application constitutes service of such notice on the employees in the bargaining unit **except those against whom an order is specifically sought in the application.**"

(emphasis added)

It is clear, from reading section 34(1)(b), that an application for a declaration of unlawful strike need only name employees "against whom an order is specifically sought." This proviso is repeated again in section 34(6) to ensure that where an applicable order is sought with respect to **specific** employees, they will need to be

personally served with the application and notice of the hearing. However, in circumstances where such a specific order is not sought, service on the union will constitute service on the employees in the unit. Section 34(6), accordingly, constitutes a full answer to the union's jurisdictional objection.

The logic behind the Board's position, as reflected in section 34(6), is manifest. The Code provides a mechanism for the quick resolution of disputes sometimes involving large unions. Its scheme would be completely frustrated if hundreds of people had to be personally served each time the Board purported to exercise its statutory power; (see also Construction Labour Relations - An Alberta Association et al. v. Alberta Labour Relations Board et al., [1985] 1 W.W.R. 509 (affirmed [1985] 4 W.W.R. 349 (Alta. C.A.)).

IV

The essential facts are not in dispute. The Saskatchewan Wheat Pool is engaged in grain handling on the west coast and is a member of the BCTEOA - an employers' association.

The Grain Workers' Union is the bargaining agent for the following group of employees:

"all operational employees employed by the five member companies of the B.C. Terminal Elevator Operators' Association in their terminal grain elevator operations in the Vancouver and North Vancouver Area, excluding office employees, maintenance engineers, foremen and persons above the rank of foreman."

(Board File 530-1821, February 26, 1990)

The employer and the union were bound by a collective agreement which expired on December 31, 1992.

The parties served the necessary notices to bargain, pursuant to section 89(1)(a) of the Code, and are presently engaged in collective bargaining. No other requirements of section 89 have been met.

On October 1, 1993, the employer temporarily laid off 10 employees due to lack of work caused by a decline in shipping demand. To accomplish this, the company eliminated the 11:00 p.m. - 7:00 a.m. shift. Overtime was nevertheless still required on weekends to do maintenance work, clean oil seeds and load vessels.

Although the employer had not experienced difficulty in the past in getting employees to work the needed overtime (Exhibit 1.11), the evidence shows that, since October 1, 1993, employees refused to work overtime because of the lay-offs.

Specifically, on the weekend of October 2, 1993, the employer needed one employee to work overtime in the Maintenance Department. All employees who were asked to work overtime refused. A majority of those employees gave the lay-offs as the reason for refusing the overtime assignment; others said they had received directions from the union (Exhibit 1.3).

The same scenario occurred in the Maintenance, Operations and Production Departments, during the weekends of October 9 and 16. The employer asked over 60 employees to work overtime; they all refused. Some employees said that they would not work "while other persons were being laid-off"; others gave different reasons (Exhibit 1.4 to 1.10).

V

The union did not contest the evidence that the employees refused to work overtime. It argued instead that since overtime is voluntary under the collective agreement a refusal, even though concerted, does not constitute an unlawful strike under the provisions of the Code.

VI

The Board's jurisdiction, in section 91 applications, is both limited and focused. Before reaching a determination that an unlawful strike has occurred, the Board must first ascertain whether a "strike" as defined by the Code has taken place. Section 3(1) of the Code defines "strike" as follows:

*"'strike' includes a cessation of work or a refusal to work or to continue to work by employees, in combination, in concert or in accordance with a common understanding, and a slowdown of work or other concerted activity on the part of employees in relation to their work that is designed to restrict or limit output."*

It is a broad definition, meant to cover a wide variety of job actions that are taken in concert or in accordance with a common understanding aimed at limiting or restricting output: see Graham Cable TV/FM (1985), 62 di 136; 12 CLRBR (NS) 1; and 85 CLLC 16,058 (CLRB no. 529); British Columbia Telephone Company (1986), 65 di 97 (CLRB no. 569), page 102.

The definition is an objective one:

"... There is no room for doubt now that Parliament has adopted an objective definition of 'strike', the elements of which are a cessation of work in combination or with a common understanding. Whether the motive be ulterior or expressed is of no import, the only requirement being the cessation pursuant to a common understanding. ..."

(International Longshoremen's Association v. Maritime Employers' Association, [1979] 1 S.C.R. 120, pages 138-139)

Simply put, motivation forms no part of a strike in the Code: see Maritime Employers' Association (1986), 64 di 111 (CLRB no. 559); and Canadian Broadcasting Corporation (1980), 40 di 35; and [1981] 2 Can LRBR 52 (CLRB no. 236), pages 45; and 60. If the Board concludes, on an objective basis, that there has been a cessation, refusal or slowdown of work, in accordance with a common understanding, which limits employee output, a strike will have occurred.

Second, the Board must determine whether the strike action in question is **unlawful**. That determination is equally an objective one. If the work stoppage or slowdown, as described in the definition of "strike", has occurred and the terms of sections 89(1)(a) to (d) have not been strictly complied with, the strike is unlawful.

## VII

In its argument, the union focused on the first aspect of the process described above. It submitted that the term "work" contained in the definition of "strike" must be interpreted in light of the work to be done under the collective agreement. It also submitted that insofar as the collective agreement stipulates that overtime work is **voluntary**, the Board was precluded from finding that a

refusal to work overtime, even though concerted, constituted an unlawful strike. In that regard it relied on the following provision in the collective agreement:

"5.02 (a) An employee will not unreasonably refuse to work overtime when requested to do so. The Company will give reasonable advance notice of necessary overtime work."

The term "work" must be understood by reference to the **usual work** done by the employees, that is, the work done in the **normal course of the employer's business**. As stated in Canada Post Corporation (1983), 54 di 152; and 5 CLRBR (NS) 280 (CLRB no. 446), a partial withdrawal of the **normal services** provided by the employees constitutes a strike:

"In the result, the Board finds that in applying the objective test referred to earlier, a refusal on the part of the employees of the Postal Corporation who are represented by CUPW to verify in the fashion that they normally do that sufficient postage is affixed to letters, would constitute an illegal strike. Similarly, the processing of mail having affixed 10¢ postage in lieu of 32¢ postage, or for that matter any amount less than 32¢ postage, as if 32¢ postage was affixed, would constitute an illegal strike."

(pages 155; and 283)

"The question to be asked," as indicated by the Board in Air Canada (1984), 59 di 67; and 8 CLRBR (NS) 397 (CLRB no. 490), (at pages 81; and 411), "is not whether the employees have an individual or collective obligation to do the work, it is, have they been doing it?" This emphasis on the continued normal operation during the term of the collective agreement is consistent with the legislative purposes of the Code (e.g. in applications brought pursuant to sections 24(4) and 50(b), the Board

has consistently applied the same "business as before" regimen in gauging appropriate employer conduct).

A principal objective of the Code is to encourage and facilitate parties to enter into collective agreements which will thereafter govern their respective conduct and rights during the currency thereof. One of the overt methods of achieving that goal is to prohibit strikes or lockouts while collective agreements remain in force.

"... the legislative scheme of the Code anticipates that normalcy will prevail until that point in time when all reasonable efforts to conclude a collective agreement have been exhausted. Economic sanctions are totally prohibited during those stages in negotiations, they simply cannot be exerted until the collective bargaining and conciliation process, if the Minister chooses to initiate it, have run their course. To preserve the normalcy and to ensure that employers do not use their managerial prerogative to gain an unfair advantage at the bargaining table, the Code places employers under double jeopardy. In addition to the specific reference to collective bargaining related motives in the definition of lockout, once notice to bargain is served, an employer is prevented from altering **any** condition of employment or **any** right or privilege of the trade union or of the employees by virtue of s. 148(b) of the Code:

...

...

Surely it fits into that legislative scheme that those on the other side of the bargaining table cannot freely alter the status quo to their own advantage."

(Air Canada, supra, pages 81-82; and 412)

It is difficult to imagine how the intention of the Code to "develop good relations and constructive collective bargaining practices" could be achieved if only one side of the industrial relations equation was compelled to maintain the status quo while the collective agreement was in force.

The Board has repeatedly held that the employees' concerted refusal to work overtime constitutes a strike within the meaning of the Code: see National Harbours Board (1979), 33 di 530; [1979] 3 Can LRBR 502; and 79 CLLC 16,204 (CLRB no. 195); Canada Broadcasting Corporation, supra, pages 44-45; and 60, affirmed on this point in Syndicat des employés de production du Québec et de l'Acadie v. CLRB [1984] 2 S.C.R. 412; Air Canada, supra; and CF Cable TV Inc. (1987), 69 di 132 (CLRB no. 624). If, in the normal course of the employer's business, members of the bargaining unit have worked overtime, then a concerted refusal to do so will amount to a strike, regardless of the parties' agreement concerning its voluntary or involuntary character.

## VIII

No direct evidence was presented that the union authorized or orchestrated the employees' refusal to work overtime. However, it is not necessary to prove that point through direct evidence; circumstantial evidence will suffice: see Air Canada, supra, pages 79; and 409 (also see Murray Hill Limousine Services Ltd. (1986), 66 di 171 (CLRB no. 582), for the same rule regarding lockouts).

Here the parties were in the midst of collective bargaining. The employees in the bargaining unit had engaged in a concerted refusal to work overtime in circumstances where, in the normal course, a sufficient number would have accepted work. In addition, the employer had been told that the union was clearly opposed to the concept of resorting to overtime when lay-offs were in effect. In light of the above, and in the absence of any evidence to the contrary, the Board must conclude that

the union was the architect of the employees' concerted refusal. We found therefore that a strike contrary to section 89 was in effect.

In the present case, although there was a strike, only the terms of section 89(1) (a) had been complied with. The parties were still engaged in collective bargaining. There was no suggestion that any of the requirements of sections 89(1) (b) to (d) had been met; consequently, the strike is unlawful and contrary to section 89 of the Code.

## IX

Generally speaking, the Board will not be placed in a position of interpreting collective agreements (see British Columbia Telephone Company, supra). Although it will not interfere in an arbitrator's jurisdiction, the Board will not ignore provisions in the collective agreement altogether. Clauses may, in fact, give some indication of what work is done by the employees in the normal course of the employer's business. However, even in those limited circumstances, if a clause is to be relied on, it must be clear and unequivocal. The provision of the collective agreement, cited by the union in this case, is far from being clear and unequivocal.

Having said this, it must be clear that the statutory definition of "strike" cannot be changed by an agreement of the parties. Nor can the public purpose of "industrial peace" behind the no-strike provision be avoided by "contracting out" of the legal obligations of the Code. (See Watts and Henderson Ltd., [1988] OLRB Rep. July 721; and Corporation of the City of Cambridge, [1989] OLRB Rep. Nov. 1095.) Of course, the parties can negotiate an

employee's **individual** right to refuse to work and these clauses will be applied in accordance with their given interpretation, subject to arbitration. However, the union or its members cannot use such a clause to circumvent the Code by giving employees the right to refuse **collectively** to work contrary to section 89. Each separate segment of the Code definition of "strike" is significant and must be read in conjunction with the other segments. Actions which are acceptable, for individual employees, because of the collective agreement provisions, may constitute an unlawful strike when done "in combination, in concert or in accordance with a common understanding," that is aimed, in relation to their work, at restricting or limiting output.

X

The union contended, in the alternative, that two work patterns existed at Saskatchewan Wheat Pool: one where there were no lay-offs and overtime was worked; and the other where there were lay-offs and overtime was not worked. It submitted that the second work pattern is the employer's accepted past practice, and that the refusal to work overtime in the present circumstances should then not be found to be an unlawful strike.

We do not agree. Even if the union's characterization of the work pattern is accurate, the Board has repeatedly held that a concerted refusal to work overtime, as occurred in the circumstances of this case, constitutes a strike. Conduct of this nature, even if tolerated in the past, does not now make legal that which is prohibited by the Code. See Watts and Henderson Ltd., supra.

The apparent rigidity of the Code provisions which proscribe unlawful strikes is substantially softened by the Board's discretionary power to issue appropriate orders.

Since its inception, the Board has exercised its power to issue orders pursuant to sections 91, 92 and 93 as a tool to foster orderly labour relations rather than as a punitive measure: see Newfoundland Steamships Limited (1974), 7 di 8; [1975] 2 Can LRBR 275; and 75 CLLC 16,147 (CLRB no. 36), at pages 9; 276; and 1147; and Canadian National Railway Company (1989), 79 di 82 (CLRB no. 770).

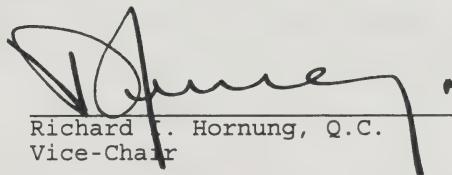
The Board views this power as a further weapon in its arsenal which it will wield to assist the parties in voluntarily concluding collective agreements or settling work stoppages in an orderly manner during the term of the collective agreement. Consequently, even if unlawful conduct has occurred, the Board has the discretion to determine whether or not it is appropriate, in the circumstances of a case, to issue a declaration or direction.

*"... Everything depends on the higher interest to be satisfied in given circumstances: these higher interests may be summarized very simply. They involve creating or helping to create the factual situation most likely to promote healthy and orderly labour relations. In order to accomplish this, the Board believes that in cases of unlawful work stoppages which are the result of disturbances in the relations between the parties, it is important to identify the cause in order to determine the remedy. This is what it has instructed its public officers to do in their meetings with the parties before the public hearing. In the foregoing, we mentioned the success of this policy and of the practice followed. However, even in the event that the Board's officer fails, it may happen that the Board will conclude after a public hearing that it may take the same action either by issuing an order containing specific*

*directives conducive to remedying the cause of the disturbance or by refusing to issue an order."*

(National Harbour Board, supra, pages 537; 508; and 467; emphasis added)

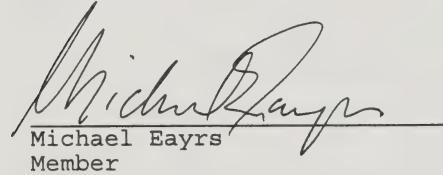
In the present case, it was apparent that the laid-off employees would not be recalled in the immediate future. The continued concerted refusal to work overtime would result in the employer's failure to fulfill its loading commitments. It was apparent, as well, that the parties would not solve the problem voluntarily. If the employees were to return to normal work methods, a settlement could only be achieved by virtue of a Board order. Accordingly, for all the above reasons, the Board issued the order set forth above.



Richard T. Hornung, Q.C.  
Vice-Chair



Calvin B. Davis  
Member



Michael Eayrs  
Member

DATED at Ottawa, this 9th day of February 1994.



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# information

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## Summary

Foreign Correspondents' Association, applicant, Canadian Wire Service Guild, Local 213 of the Newspaper Guild, certified bargaining agent, Canadian Broadcasting Corporation, employer, and Canadian Union of Public Employees, Syndicat des journalistes de Radio-Canada et National Association of Broadcast Employees and Technicians, intervenors.

Board File: 530-1827

Decision No.: 1056



Application for reconsideration pursuant to sections 18 of the Code and 37(2) of the Board's Regulations.

CBC's foreign correspondents were included in a bargaining unit consisting of journalists in a decision issued in 1992. They were duly informed of every step of the proceedings. They claimed they should be excluded from that unit on the grounds of non-residence. They also sought to maintain the previous bargaining structure with a distinct unit consisting of foreign correspondents. The Board's jurisdiction was questioned. However, the correspondents failed to act with due diligence. The application was found to be untimely pursuant to section 37(2) of the Regulations and was dismissed.

Without deciding the jurisdiction issue, the Board noted that its jurisdiction on employees working outside Canada is founded on the criterion of their employment relationship with a federal undertaking and does not depend on the employees' residence. The Board also commented on the likely consequences were it to rule on this issue.

## Résumé

Association des correspondants à l'étranger, requérante, Guilde des services de presse du Canada, section locale 213 de la Guilde des journalistes, agent négociateur accrédité, Société Radio-Canada, employeur, et Syndicat canadien de la fonction publique, Syndicat des journalistes de Radio-Canada et Syndicat national des travailleurs et travailleuses en communication, intervenants.

Dossier du Conseil: 530-1827

Décision n° 1056

Demande de réexamen présentée en vertu de l'article 18 du Code canadien du travail et du paragraphe 37(2) du Règlement.

Les correspondants à l'étranger de Radio-Canada ont été inclus dans l'unité de négociation regroupant les journalistes dans une décision de 1992. Ils ont été dûment informés des procédures en temps opportun. Ils allèguent qu'ils devraient être exclus au motif de non-résidence au Canada. Ils ont présenté une demande parallèle en vue de maintenir la structure de représentation antérieure qui reconnaissait les correspondants comme unité de négociation distincte. La question de la compétence du Conseil a été soulevée. Toutefois, les requérants n'ont pas fait preuve de diligence. La demande a été jugée tardive aux termes du paragraphe 37(2) du Règlement et a été rejetée.

Sans se prononcer sur la question de compétence, le Conseil a fait remarquer que sa compétence sur des employés travaillant à l'extérieur du Canada repose sur leur relation d'emploi avec une entreprise fédérale et ne dépend pas du facteur de résidence. Le Conseil a également commenté les conséquences possibles d'un jugement à cet égard.

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Canada  
Labour  
Relations  
Board

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Conseil  
Canadien des  
Relations du  
Travail

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Reasons for decision

Foreign Correspondents' Association,

applicant,

and

Canadian Wire Service Guild,  
Local 213 of the Newspaper Guild,

certified bargaining agent,

and

Canadian Broadcasting Corporation,

employer,

and

Canadian Union of Public Employees, Syndicat des journalistes de Radio-Canada and National Association of Broadcast Employees and Technicians,

intervenors.

Board file: 530-1827

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The Board was composed of Mr. Serge Brault, Vice-Chairman, and Messrs. J. Jacques Alary and François Bastien, Members.

Appearances

Mr. Charles T. Hackland, assisted by Ms. Allison Phillips, student-at-law, and Mr. Terry Milewski, journalist and FCA representative, for the applicant;

Mr. Aubrey E. Golden, Q.C., assisted by Mr. Dan Oldfield, Assistant Business Manager, for the Canadian Wire Service Guild, Local 213 of the Newspaper Guild;

Ms. Suzanne Thibaudeau, Q.C., and Mr. Guy Dufort, assisted by Mrs. Evelyn Bourassa, for the Canadian Broadcasting Corporation;

Messrs. Ken Hopper and Gordon Johnson, for the Canadian Union of Public Employees;

Messrs. Clément Groleau and Gilles Provost, for the Syndicat des journalistes de Radio-Canada; and

Messrs. David Roberts and Gordon Hunter, for the National Association of Broadcast Employees and Technicians.

These reasons for decision were written by Mr. Serge Brault, Vice-Chairman.

I

This decision follows a hearing held in Montréal, Quebec, on January 13, 1994, into an application for reconsideration filed by the Foreign Correspondents' Association (FCA or the correspondents) on behalf of the foreign correspondents who work for the Canadian Broadcasting Corporation (CBC).

In their application, the correspondents seek to be excluded from bargaining Unit no. 1 at CBC's English network, which comprises all on-air personnel. That application, filed in early December 1993, followed the issuance of a certification order to the Canadian Wire Service Guild, Local 213 of the Newspaper Guild (CWSG) as bargaining agent for that unit.

The CWSG's certification marked the final stage of the global review of the bargaining structure at CBC's English network. That process formally started in March 1990 when CBC applied to have all on-air personnel consolidated in a single bargaining unit.

These proceedings were complex and lasted close to four years before coming to an end (Canadian Broadcasting Corporation (1991), 84 di 1 (CLRB no. 846); Canadian Broadcasting Corporation (1992), 87 di 163; and 92 CLLC 16,036 (CLRB no. 926); Canadian Broadcasting Corporation (1992), 89 di 1 (CLRB no. 954); Canadian Broadcasting Corporation (1993), as yet unreported CLRB decision no. 1004; and Canadian Broadcasting Corporation (1993), as yet unreported CLRB decision no. 1007). The FCA was privy to each and every step of the global review from the very start.

The gist of this application for reconsideration is that CBC's foreign correspondents are not subject to Canadian law since they reside outside of the country. The correspondents also argue that they should be allowed to keep their current bargaining status.

The legal provisions material to this application are sections 18 of the Code and 37(2) of the Regulations:

"18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application."

\* \* \* \* \*

"37. (2) An application under section 18 of the Act to reconsider a decision or order that is alleged to be erroneous in law or contrary to the policies of the Board shall be filed within 21 days after the date the decision or order being contested was made."

II

The FCA's position must be put in the overall historical context of these proceedings. They commenced with an application filed by CBC in 1990 to consolidate in a

single bargaining unit all on-air personnel as part of the global review of its English network bargaining structure.

Initially, the FCA was not identified as a bargaining agent in CBC's pleadings filed in March 1990. Specifically, it was only involved in these proceedings as of April 18, 1990, following submissions made by Claude Latrémouille. As of that date, the FCA was served a copy of every document filed with, or issued by, the Board in these proceedings.

Yet, even though the FCA was served such documentation regularly during the following two years, the foreign correspondents never appeared before the Board, let alone responded or filed any submissions with regard to these proceedings. As a matter of fact, the FCA is probably the only group identified as an interested party that chose not to make submissions, nor to appear before the Board. All its correspondence was sent care of the president of the association wherever that person was posted.

The FCA was invited, like all other union organizations within CBC, to take part at every step of the process. The Board's first major decision dealt with the territorial definition of the so-called English and French networks. That decision which the FCA seems to question allowed CBC's request that all its bargaining units be rationalized in terms of territory covered and be divided along consistent geographic lines identified with the so-called French and English networks.

At one point, the FCA was forwarded a copy of Canadian Broadcasting Corporation (846), supra, which dates back to January 15, 1991. There the Board actually decided that

all on-air personnel would indeed be consolidated in a Production and Presentation Unit (Unit no. 1). That decision listed in an appendix each and every bargaining agent involved, including the FCA. That decision was never challenged by the FCA nor by any of its members.

A year later, in April 1992, the Board identified in Canadian Broadcasting Corporation, May 5, 1992 (LD 1023), which classifications would be included in Unit no. 1. It listed "foreign correspondent" as one of those classifications. There was no reaction from the foreign correspondents until May 1993, when for the first time, they applied for reconsideration. The Association argued that the foreign correspondents wanted to keep the status quo in terms of bargaining structure and, in consequence, remain an independently represented group within the on-air personnel of CBC. At no time did the FCA suggest that foreign correspondents were not subject to Canadian law and that the Board lacked jurisdiction to consolidate their group with others the way it did. In a letter decision issued last year (Canadian Broadcasting Corporation, June 21, 1993 (LD 1177)), the Board dismissed the application as being untimely.

Thus, having determined the positions included in Unit no. 1, the Board then proceeded to identify the incumbents of those positions as there was a need to ascertain which bargaining agent enjoyed majority support. To that end, CBC prepared a detailed listing of all employees included in the unit. The foreign correspondents were among those individually listed. On the occasion of the vote, each foreign correspondent received a notice of the vote and a ballot to be returned by mail. Neither the FCA, nor any of its members reacted to this development, particularly

in terms of challenging the Board's authority to hold a vote amongst its members. The Board's files show that two of them did in fact return their ballots.

For its part, CBC never sought to exclude the foreign correspondents from the scope of Unit no. 1, on any grounds. Nor has any bargaining agent ever challenged the foreign correspondents' right to take part in the selection of a new bargaining agent for Unit no. 1.

Throughout these proceedings, the FCA has been described and considered by all involved as a bargaining agent for the purpose of the Code and its members, as employees for the same purpose.

### III

According to the evidence of Terry Milewski, a correspondent posted in Washington, D.C., the FCA did not react before 1993 to earlier Board decisions because the group had received personal assurances from high ranking officials of CBC that, for the purpose of collective bargaining, its status as an independent group would not be affected by the instant proceedings.

While there is no reason to doubt Mr. Milewski's evidence, the fact remains that throughout these proceedings, it was never CBC's position that the foreign correspondents' situation warranted a stand-alone unit. Therefore, we can only assume that, for reasons unknown, the assurances alluded to by the FCA did not materialize in the arguments CBC put before the Board.

Be that as it may, regardless of any possible breach in communications within CBC, proceedings such as these remain governed by the rules of certification, particularly where appropriateness is at centre stage. Hence, the ultimate determination on appropriateness is the province of the Board and not of the parties, be it the CBC. This being so, based on the evidence heard, we do not see, from a labour relations perspective and regardless of any assurances given, how a different bargaining structure would have been successfully carved out of Unit no. 1 to accommodate a group of 15 or so foreign correspondents.

Numerous groups with strong professional ties have been consolidated. Prestige or distance alone cannot, with respect, be decisive criteria in the circumstances of this case. A reporter based in the Far North is farther away from the Toronto headquarters and probably as autonomous and isolated professionally as a correspondent based outside Canada in a major centre. Yet, in the end, they all share the same interests.

IV

This application raises a second argument. It has to do with the Board's alleged lack of jurisdiction over individuals who, while admittedly being on CBC's staff, reside outside of Canada.

In essence, the FCA argues that the Board does not have jurisdiction over individual correspondents based outside of the country. Mr. Milewski testified that he, like many of his colleagues, has no residence in Canada, that he is

considered non-resident for income tax purposes and, allegedly, he is not subject to Canadian law.

The argument dealing with the jurisdiction issue is the gist of the correspondents' reasons in favour of their exclusion. As to why the FCA did not raise this before, its representative explains in essence that by virtue of the postings abroad, the group did not have the time to do anything. Furthermore, it felt there was no real need to do anything given the personal assurances received from CBC.

V

The first question we need to address is that of timeliness. Section 37(2) of the Regulations stipulates the time limitation during which such applications must be filed (see page 3). The decisions that the FCA wants the Board to reconsider were issued in 1991 and 1992.

Even though the Board may be quite sensitive to the unique conditions under which foreign correspondents work, those circumstances cannot be stretched to the point of excluding the FCA from the scope of section 37 of the Regulations. For most of the time material to the issue before us, the FCA's president was in Washington, D.C.

The foreign correspondents allege they do not come under the Code. Whatever the value of that allegation, the fact remains they are not above section 37(2) when they apply for reconsideration pursuant to section 18.

The FCA meets formally once a year for a few days. For the occasion, all foreign correspondents report back to

Canada. They discuss amongst themselves and with CBC matters of mutual concern, including as the evidence shows, labour relations issues. A document filed by the FCA on May 17 of last year (document #609) states that the group met on April 29, 1993. On that occasion, the correspondents voted to keep the FCA as bargaining agent and made their first application for reconsideration.

The infrequency of the meetings, coupled with the personal assurances given, would explain the group's failure to act before vis-à-vis these proceedings.

VI

This is the FCA's second application to have the Board set aside decisions issued in Phases I or II. (See Canadian Broadcasting Corporation (846), supra.) Section 37(2) of the Regulations is quite clear (see page 3) and the FCA's application is definitely untimely.

While the correspondents' good faith is not in dispute, their due diligence definitely is. The group received all correspondence issued, precisely in order to keep abreast of what was going on. Mr. Milewsky recognized that some of that mail was likely discarded or not opened as being of no interest. This application being untimely, it follows that, with regard to the extra-territoriality issue, there is no real need for this Board to address it as it was not raised in due course.

Nevertheless, because of the particular circumstances of this case, the merits of the application warrant a few comments. The purpose of the correspondents' application is their ultimate exclusion from Unit no. 1. Their main

argument in favour of that position is the Board's lack of jurisdiction.

The Board has previously recognized that the Code may apply to employees of a federal undertaking working outside Canada (Bell Canada (1981), 43 di 86; [1982] 3 Can LRBR 113 (CLRB no. 300), at pages 101-105 and 124-127; and Dome Petroleum limited (1978), 31 di 189; [1978] 2 Can LRBR 518 (CLRB no. 153)). The Board's jurisdiction on those employees is founded on the criterion of employment relationship with a "federal undertaking" as defined by section 2 of the Code. To that effect, section 4 of the Code provides:

*"4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers."*

Consequently, wherever people reside, if they are employed in connection with the operation of a federal undertaking, their labour relations with the federal employer may be governed by the Code. In the instant case, the individual correspondents have not contested that they are employed by CBC.

Without deciding the jurisdiction issue, we believe that, even if well founded, the correspondents' argument would still not achieve what they seek to obtain. Why? Firstly, because if indeed the Board lacked the jurisdiction to include the correspondents in Unit no. 1, it would, by way of consequence, also lack jurisdiction to include correspondents in any bargaining unit including their own! If they cannot be included in Unit no. 1 for

lack of jurisdiction, nor can they be included in another unit for the very same reason. Secondly, in such circumstances, even a formal exclusion from Unit no. 1 would still likely not prevent the bargaining agent certified for Unit no. 1 and CBC from negotiating the terms and conditions of CBC's non-unionized or non-resident journalists doing work covered by their certificate. Nor would it prevent them from negotiating the possible reinsertion in Unit no. 1 of foreign correspondents after they return from their assignments abroad.

Counsel for CBC suggested that this argument over exclusion may deal essentially with the Board's jurisdiction over particular employees more or less on an individual basis rather than as a group.

If foreign correspondents were to seek their exclusion, individually rather than collectively, on the basis of their personal non-resident status, this might eventually dispense those who succeed from paying dues. By the same token, it would, however, deprive them of any form of collective bargaining guaranteed under the Canada Labour Code and of the statutory duty of fair representation they are owed by their bargaining agent under section 37 of the Code.

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

This brings us to reissue this reminder. At the Board's hearing into this application, counsel for the FCA, for the CWSG and for CBC engaged, at the Board's invitation, in private conversations to try to resolve this matter amicably between them. Although described by each counsel as positive, these discussions failed to bring about a settlement. However, counsel for the CWSG indicated that the organization was sensitive to the particular needs and conditions of foreign correspondents, and stated that it was willing to try to accommodate them. On the other hand, counsel for CBC also indicated the CBC's willingness to accommodate any internal arrangement that the CWSG and the foreign correspondents might work out. Given these statements of good will, the Board expresses the hope that in the same spirit of well-understood self-interest, a satisfactory labour relations solution may still be found following the issuance of these Reasons.

VII

In view of the requirements of section 37(2) of the Regulations, and having considered the evidence heard and the submissions filed by counsel, the Board finds that the FCA's application is untimely and it is accordingly dismissed.

In practical terms, this means that the certification order issued to the Canadian Wire Service Guild, Local 213 of the Newspaper Guild, on November 4, 1993, as revised on December 10, 1993, will remain intact. This also means that the FCA will go on being the bargaining agent duly recognized under the Code for those foreign correspondents of the French network, as indicated in the final text of

the certification issued to the CWSG and dated November 4, 1993, as revised.

Serge Brault  
Serge Brault  
Vice-Chairman

J. Jacques Alary  
J. Jacques Alary  
Member

François Bastien  
François Bastien  
Member

ISSUED at Ottawa, this 22nd day of February 1994.

CLRB/CCRT - 1056



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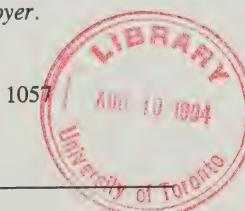
## Summary

Syndicat des communications graphiques, Local 41-M, *applicant*, and J.C. Fibers Inc., *employer*.

Board File: 555-3624

Jean-Paul Beauregard et al., *complainants*, and J.C. Fibers Inc., *employer*.

Board File: 745-4595  
CCRT/CLRB Decision no. 1057  
February 23, 1994



This decision deals with the issue of the Board's constitutional jurisdiction over the operations of J.C. Fibers Inc., i.e. the recovery of recycling paper and transportation activities.

The paper recovery aspect consists in the buying and the selling of recycling paper and, in certain cases, the sorting and bundling functions. The transportation activities consist in transporting paper for third parties or for the company. These activities are carried out in a regular and continuous fashion within and outside the province of Quebec.

The Board decided that J.C. Fibers Inc. falls within a shared constitutional jurisdiction. It found that the business is severable since it carries out two separate activities that are divisible on the constitutional level.

## Résumé

Syndicat des communications graphiques, local 41-M, *requérant*, et Les Fibres J.C. Inc., *employeur*.

Dossier du Conseil: 555-3624

Jean-Paul Beauregard et autres, *plaignants*, et Les Fibres J.C. Inc., *employeur*.

Dossier du Conseil: 745-4595  
CCRT/CLRB Décision n° 1057  
le 23 février 1994

La présente décision porte sur la question de la compétence constitutionnelle du Conseil relativement aux activités exercées par Les Fibres J.C. Inc., soit la récupération de papier à recycler et le transport général par camions.

Le volet récupération de papier comporte l'achat et la vente de papier à recycler et, dans certains cas, le tri et la mise en ballots du papier. Le volet transport par camions comporte des activités de transport effectuées pour des tiers de même que le transport du papier dont la compagnie est propriétaire. Les activités de transport s'exercent de façon régulière et continue à l'intérieur et l'extérieur de la province du Québec.

Le Conseil juge que l'entreprise Les Fibres J.C. Inc. est assujettie à une compétence constitutionnelle partagée. Il estime que cette entreprise est divisible, puisqu'elle exerce deux activités distinctes, dissociables au plan constitutionnel.

Pursuant to this decision, the employer's transportation activities, including the transportation of recycling paper, come under federal jurisdiction. The sorting and bundling activities remain under provincial jurisdiction in view of their purely local character. The functional integration and dependence factors that would allow the Board to conclude that buying and selling paper constitute an integral and essential part of the federal business, and therefore are subject to federal jurisdiction, are not present.

Despite certain practical consequences that could result from the decision to subject an employer's labour relations to more than one jurisdiction, the Board indicated that such a situation must not prevent a tribunal from dealing with a jurisdiction issue on the basis of the applicable principles. The Board adopted in this regard the Supreme Court's reasoning in two of its judgments.

Cette décision a pour effet d'assujettir à compétence fédérale toutes les activités de transport de l'employeur, y compris transport lié à la récupération de papier recyclé. Quant aux activités de triage et mise en ballots du papier, elles demeurent compétence provinciale, étant donné le caractère purement local. Les facteurs d'intégration fonctionnelle et de dépendance qui permettraient de conclure que l'entreprise d'achat et de vente de papier est une partie intégrante et essentielle de l'entreprise fédérale principale, et donc qu'elle est compétence fédérale, n'existent pas.

Malgré certaines conséquences d'ordre pratique que peut engendrer la décision d'assujettir les relations du travail d'un employeur à plus d'une compétence constitutionnelle, le Conseil indique qu'une telle situation ne doit pas empêcher le tribunal de décider la question de la compétence constitutionnelle en fonction des principes constitutionnels applicables. Le Conseil adopte, à cet égard, le raisonnement suivi par la Cour suprême dans deux de ses jugements.

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## Reasons for decision

Syndicat des communications graphiques, Local  
41-M,

*applicant,*

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Board File: 555-3624

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Jean-Paul Beauregard et al.,

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J.C. Fibers Inc.,

*employer.*

Board File: 745-4595  
Decision no. 1057  
February 23, 1994

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The Board was composed of Ms. Louise Doyon, Vice-Chair, and Messrs. Robert Cadieux and François Bastien, Members.

### Apearances

Mr. Michel Morissette, for the complainants; and

Ms. Manon Savard, accompanied by Messrs. Joe Colubriale, President, Frank Colubriale, Traffic Manager, and Bob Colubriale, Dispatcher, for the employer.

These reasons for decision were written by Ms. Louise Doyon, Vice-Chair.

I

At a public hearing held in Montréal on November 4, 1993, the Board raised proprio motu the question of its constitutional jurisdiction to deal with the two cases brought before it: an application for certification filed on August 4, 1993 by the Syndicat des communications graphiques, Local 41-M, to represent the truck drivers of the employer, J.C. Fibers Inc., and ten complaints of unfair labour practice filed on August 30, 1993 against this employer.

The Board requested that the employer produce additional evidence on the nature of its activities. This additional information was presented at the hearing on November 5. The union did not adduce any additional evidence on this question. The employer subsequently filed written submissions and provided other information the Board had requested.

On December 3, 1993, the Board informed the parties, in a letter decision, that all the employer's transportation activities are federal activities covered by section 92(10)(a) of the Constitution Act, 1867, whether they involved intraprovincial, interprovincial or international transport or transporting goods belonging to the employer or to its customers. The Board therefore certified the union to represent:

*"all truck drivers employed by J.C. Fibers Inc."*

The Board also found that the employer's recycling paper sorting and bundling activities do not come under federal jurisdiction because these activities do not as such constitute a federal work, undertaking or business and are not an integral or essential part of the operation of the core federal undertaking, namely, transportation.

This constitutes the Board's reasons for its decision on the constitutional jurisdiction issue.

## II

The employer's business consists of two components: the recovery of recycling paper and general transportation by truck. The corporate headquarters, located in Chambly, houses the administrative offices, the equipment used to prepare paper for delivery, storage space and the fleet of tractors and trailers. The company also leases paper storage space in Saint-Jean. When the application for certification was filed, the company owned 14 tractors, some 80 trailers, and a delivery truck. It employed 27 truck drivers, 20 employees classified as forklift operators and day labourers, and administrative support staff. These group of employees are not interchangeable.

The recycling paper recovery component operates as follows. The company enters into contracts with various suppliers (printers, banks, office buildings, etc.) to purchase recycling paper and resells this paper to businesses that specialize in converting paper, primarily stationers. The terms of these contracts range from one to five years and their performance requires travel in Quebec, Ontario, the Maritimes and the United States. The company employs its own drivers and uses its own tractors and trailers to collect paper from its customers and delivers this paper to its customers who buy it. Sometimes the company leases trucks or relies on brokers, as required. The recycling paper that the company purchases for resale accounts for some 45% of the total volume of goods transported.

If paper is purchased in bulk, i.e., is not ready for immediate delivery to the buyer, it is trucked to the Chambly facility where it is prepared for delivery. It is first unloaded from the trucks, sorted, and then bundled by specialized equipment consisting of conveyors and a press. Paper that is bundled accounts for approximately 25% of the paper that the company purchases and is the only type of goods handled in Chambly or Saint-Jean. The unloading, sorting and bundling work is done by the forklift operators and day labourers. If there is no immediate buyer for this paper, whether it is received ready for delivery or after it has been bundled, it is stored in

Chambly or Saint-Jean.

The second component of the company's activities consists of general transportation for third parties. The company offers pick-up and delivery services for goods that remain the property of its customers. Most of these goods consist of recycling paper to be delivered to conversion companies. J.C. Fibers Inc. transports other types of goods, such as finished paper products, preserves, doors, etc. These general transportation activities are carried out on a regular and continuous basis in Quebec, Ontario, the Maritimes and the United States. Between October 1992 and October 1993, general transportation activities accounted for more than 27% of the travelling done and, in the three months preceding the filing of the application for certification, this figure rose to 46%.

Transportation contracts are negotiated on a different basis from that of paper purchase contracts. As a rule, their term is shorter and the cost is based on mileage, not on weight or volume.

General transportation enables the company to diversify its commercial activities and capitalize on its equipment, while promoting maximum use of the truck drivers.

III

Section 4 of the Canada Labour Code (Part I - Industrial Relations) determines the Board's jurisdiction:

*"4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or*

*employers.*"

Section 2 defines the expression "federal work, undertaking or business" as follows:

*"federal work, undertaking or business" means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,*

*(a) a work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada,*

*(b) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province,*

*(c) a line of ships connecting a province with any other province, or extending beyond the limits of a province,*

*(d) a ferry between any province and any other province or between any province and any country other than Canada,*

*(e) aerodromes, aircraft or a line of air transportation,*

*(f) a radio broadcasting station,*

*(g) a bank,*

*(h) a work or undertaking that, although wholly situated within a province, is before or after its execution declared by Parliament to be for the general advantage of Canada or for the advantage of two or more of the provinces, and*

*(i) a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces;*

*(j) a work, undertaking or activity in respect of which federal laws within the meaning of the Canadian Laws Offshore Application Act apply pursuant to that Act and any regulations made under that Act."*

The Board's jurisdiction in labour relations matters is an exceptional one. In Construction Montcalm Inc. v. Minimum Wage Commission et al., [1979] 1 S.C.R. 754, the Supreme Court of Canada said the following:

*"This issue [of constitutional jurisdiction] must be resolved in the light of established principles the first of which is that Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule: Toronto Electric Commissioners v. Snider. By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject: In re the validity of the Industrial Relations and Disputes Investigation Act (the Stevedoring case). It follows that primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence..."*

(page 768; emphasis added)

Moreover, whether an undertaking is federal depends on its normal and habitual activities, a principle established by the Supreme Court of Canada in Northern Telecom Limited v. Communication Workers of Canada et al., [1980] 1 S.C.R. 115; (1979), 98 D.L.R. (3d) 1; and 79 CLLC 14,211 (Northern Telecom no. 1), in which it specifically said:

*"(5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation.*

*(6) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of 'a going concern', without regard for exceptional or causal factors; otherwise, the Constitution could not be applied with any degree of*

*continuity and regularity."*

(pages 132; 13; and 143)

In the instant case, the Board determined that J.C. Fibers Inc. is subject to shared constitutional jurisdiction. It found that this business is divisible because it carries out two separate activities that are severable constitutionally.

The effect of this decision is to bring all the employer's transportation activities under federal jurisdiction, including transportation related to the recovery of recycling paper. As for the recycling paper sorting and bundling activities, they remain under provincial jurisdiction, since they are purely local in nature.

In Attorney-General for Ontario et al. v. Winner et al., [1954] 4 D.L.R. 657, the Privy Council dealt with the severability of a business in a case where the owner of a bus line was operating both intraprovincial and interprovincial routes:

*"... The question is not what portions of the undertaking can be stripped from it without interfering with the activity altogether: it is rather what is the undertaking which is in fact being carried on. Is there one undertaking, and as part of that one undertaking does the respondent carry passengers between two points both within the province, or are there two?"*

...

*No doubt the taking up and setting down of passengers journeying wholly within the Province could be severed from the rest of Mr. Winner's undertaking but so to treat the question is not to ask is there an undertaking and does it form a connection with other countries or other Provinces but can you emasculate the actual undertaking and yet leave it the same undertaking or so divide it that part of it can be regarded as interprovincial and the other part as provincial.*

*The undertaking in question is in fact one and indivisible. It is true that it might have been carried on differently and might have been*

*limited to activities within or without the Province, but it is not, and their Lordships do not agree that the fact that it might be carried on otherwise than it is makes it or any part of it any the less an interconnecting undertaking."*

(pages 679-680)

This decision led the courts to consider as being under federal jurisdiction an undertaking that engages in both intraprovincial transportation and interprovincial or international transportation on a regular and continuous basis and not occasionally. (On this question, see Regina v. Cooksville Magistrate's Court, Ex parte Liquid Cargo Lines Ltd., [1965] 1 O.R. 84; and (1964), 46 D.L.R. (2d) 700 (H.C.J.), pages 88-89; and 704-705; Pacific Produce Delivery and Warehouses Ltd. v. Labour Relations Board, [1974] 3 W.W.R. 389 (B.C.C.A.), page 398; Charterways Co. Limited (1974), 2 di 18; [1974] 1 Can LRBR 161 (partial report); and 74 CLLC 16,097 (CLRB no. 4), pages 21-22; and 842-843; Wholesale Delivery Service (1972) Ltd. (1978), 32 di 239; and [1979] 1 Can LRBR 90 (CLRB no. 154), pages 240-241; and 91; Ottawa Taxi Owners and Brokers Association (1984), 56 di 73 (CLRB no. 464), page 80; and Emde Trucking Ltd. (1985), 60 di 66; and 10 CLRBR (NS) 1 (CLRB no. 501).)

In the instant case, J.C. Fibers Inc. engages in intraprovincial and interprovincial transportation on a regular and continuous basis for customers and for itself as part of its business of buying and selling recycling paper. This transportation activity is indivisible and falls within federal jurisdiction, based on the criteria established by the case law on this subject. These activities are highly integrated and could not be severed or described in terms of the ownership of the goods transported, the assignment of employees to this activity or the use of special equipment.

As for the buying and selling activities, the Board decides that they are purely local in nature and come under provincial jurisdiction. These activities do not constitute

an integral and essential part of the core federal undertaking, i.e., the transportation business, and are severable from it.

As author Micheline Patenaude points out in "L'entreprise fédérale" (1990), 31 C. de D. 1195:

*"However, just because the owner of a federal undertaking also engages in activities of a local nature does not mean that these activities are necessarily those of a federal work, undertaking or business. This is in fact what the Privy Council found in Empress Hotel when it held that the activities of the Canadian National Railway Company in respect of the hotel that it owned were those of a local undertaking. ..."*

(page 1260; translation)

In the present case, the factors of functional integration and dependency, which would support a finding that the buying and selling business is an integral part of the core federal undertaking and therefore comes under federal jurisdiction, do not apply. The operational structure the company adopted in order to operate this part of the business is an important consideration. The employees who sort and bundle the paper and the truck drivers are not interchangeable, as a significant amount of the paper that is bought and resold is not handled by any employees other than the truck drivers.

In United Transportation Union v. Central Western Railway Corporation, [1990] 3 S.C.R. 1112, the majority, per Dickson, C.J., reviewed the case law of the Supreme Court of Canada on the question of the nature and degree of the relationship that must exist between the various activities in order to find that one or more of these activities is an integral and essential part of a core federal undertaking. Chief Justice Dickson analyzed in particular the judgments in Re Eastern Canada Stevedoring Company Limited, [1955] 1 S.C.R. 529; Letter Carriers' Union of Canada v. Canadian Union of Postal Workers et al., [1975] 1 S.C.R. 178; as well as Northern Telecom no. 1,

supra; and Northern Telecom Canada Limited et al. v. Communication Workers of Canada et al., [1983] 1 S.C.R. 733; (1983), 147 D.L.R. (3d) 1; and 83 CLLC 14,048 (Northern Telecom no. 2). He concluded that the test applied in these cases to determine constitutional jurisdiction is based on the federal undertaking's dependency on the provincial undertaking. He focussed on the difference in the connections existing between the activities of Northern Telecom and Bell Canada and those existing between Central Western Railway and CN. In the latter case, the federal nature of a section of railway sold by CN to Central Western and located in the middle of a CN line was at issue. After noting that Northern Telecom's employees have many contacts and must closely co-ordinate their work with Bell Canada employees in installation activities that are merely one step in an integrated process, Chief Justice Dickson stated:

"... if work occurs simultaneously between the two enterprises functional integration may exist. This temporal integration does not exist, however, between the appellant and CN, as each operates independently within its own sphere. The appellant is responsible for taking empty grain cars to the various elevators, filling them with grain and then transporting them to Ferlow Junction where they are transferred to CN locomotives. Only when the grain cars are transferred do the two companies co-ordinate their work. The transfer can thus be seen as a connection at the end of the local transportation process, unlike in Northern Telecom No. 1 where the service provided by Northern Telecom took place simultaneously with the service provided by Bell. Both Bell Canada and Northern Telecom were seen to work together in order to provide a single service. Furthermore, it was necessary for Northern Telecom workers to be on Bell premises on a daily basis. Such is not the case in this appeal because CN employees and trains only enter upon Central Western's property in order to transfer grain cars to or from Ferlow Junction.

...

*Finally, and perhaps most importantly, it cannot be said that CN is in any way dependent on the services of the appellant. ... "*

(United Transportation Union v. Central Western Railway

Corporation, supra, pages 1141-1142; emphasis added)

After having examined the facts in this case, and in the light of the criteria of dependency and functional integration established by the case law, the Board determined that the core federal undertaking, transportation, is not dependent on the recycling paper buying and selling undertaking. In terms of its core activities, the transportation undertaking, here understood within the meaning of the Code, is considered to supply its services to a paper recycling undertaking, as it would to any other customer. The fact that these two undertakings happen to be operated by a single corporate entity does not in itself alter the way in which this entity must be characterized for constitutional purposes.

This being the case, the Board is fully aware of the practical difficulties that may result from shared constitutional jurisdiction over labour relations. On this question, in a recent decision in Ontario Hydro v. Ontario (Labour Relations Board), [1993] 3 S.C.R. 327; and (1993), 93 CLLC 14,061, the Supreme Court of Canada reaffirmed that these difficulties were not determinative in resolving constitutional questions. Justice LaForest had the following to say:

*"Finally, there is the argument based on inconvenience. Bifurcating legislative power over labour relations in Ontario Hydro, a single enterprise, would, it is said, create practical difficulties. Two sets of rules would apply to different employees and, of course, there is the difficulty of drawing the line between federal matters and provincial matters. These problems are not really new. The interrelationship between Parliament's power over federal works and closely related provincial activities has always raised practical difficulties. Even the present type of difficulty is not unique. In Shur Gain Division, supra, the Federal Court of Canada had occasion to deal with a similar situation. Again, it is obvious from a close reading of the Stevedoring case, supra, that had the shipping company there been engaged solely in intraprovincial shipping (as opposed to interprovincial as was assumed), stevedores could not have been combined in a unit comprising office employees or other workers engaged in matters not related to navigation. Similar views*

*are expressed in other cases; see, for example, R. v. Picard, Ex parte International Longshoremen's Association, Local 375 (1967), 65 D.L.R. (2d) 658 (Que. Q.B.), and Northern Telecom Limited v. Communications Workers of Canada, [1980] 1 S.C.R. 115. Various techniques of administrative inter-delegation have been developed to deal with problems of conjoint interest following upon the case of Winner, supra. If the problems here are sufficiently acute, and Parliament deems it appropriate to do so, resort could be had to such techniques."*

(pages 374-375; and 12,345)

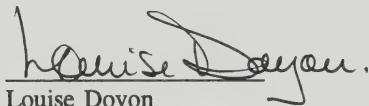
In Northern Telecom no. 2, supra, the Court had earlier said the following on this question:

*"We are not here concerned with whether or not the installers in question form a unit appropriate for collective bargaining, but simply the nature of the services performed by these employees of Telecom in the course of their work in connection with the Bell telecommunications network. Neither are we here concerned with the question of relative efficiency as between the assignment of the labour relations here in question to the federal or the provincial jurisdiction. ... It should also be pointed out that the identification of the appropriate jurisdiction for these employer-employee relations does not depend upon a microscopic examination of the considerable amount of detail involved in the description of the daily work routines of the installers as they perform the installation services provided by Telecom to Bell, as described above. Rather we must be engaged in the determination of the issue in this appeal on an overall assessment of the record, documentary and testimonial, in order to ascertain whether the installers are engaged integrally in the operation of the federal work, namely the Bell telecommunications network; or whether, on the other hand, these services are truly performed as the last act in the manufacture by Telecom of their specialized products in switching and transmission."*

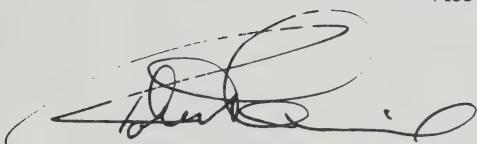
(pages 760; 30; and 12,255; emphasis added)

For these reasons, the Board concluded that the labour relations associated with the

transportation activities of J.C. Fibers Inc. come under federal jurisdiction, but that the labour relations of the paper recycling purchase and resale undertaking do not.



Louise Doyon  
Vice-Chair



Robert Cadieux  
Member



François Bastien  
Member



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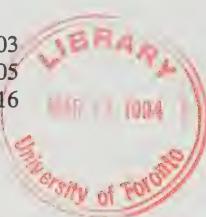
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## Summary

National Automobile, Aerospace and Agricultural Implement Workers Union of Canada and International Association of Machinists and Aerospace Workers, applicants, Canadian National Railway Company Limited and AMF Technotransport Inc., respondent employers, and various unions, interested parties.

Board files: 560-303  
560-305  
585-516

Decision no. 1058



These reasons deal with a request for adjournment of three applications presently before the Board: two applications for a declaration of single employer pursuant to section 35 of the Code and one application for a declaration that there has been a sale of business from Canadian National Railway Company Limited to AMF Technotransport Inc. (AMF) pursuant to section 44 of the Code.

The preliminary question to be determined is whether the Board has constitutional jurisdiction to decide the applications. A motion has been filed with the Superior Court of Quebec by AMF for a declaratory judgment that its operations fall under provincial jurisdiction. This motion will be heard on March 14, 1994.

The Board exercised its discretion not to adjourn the proceedings in light of its policy not to adjourn proceedings pending court challenges. In the instant case, there is no "court challenge" as such since the remedy which AMF is seeking before the Superior Court is a general declaration. Given that, on the return of the motion for declaratory judgment, a motion would be made by the National Automobile, Aerospace and Agricultural Implement Workers Union of Canada to convert the matter into one

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## Résumé

Syndicat national des travailleurs et travailleuses de l'automobile, de l'aérospatiale et de l'outillage agricole du Canada et Association internationale des machinistes et des travailleurs de l'aérospatiale, requérants, Compagnie des chemins de fer nationaux du Canada et AMF Technotransport Inc.; employeurs intimés, et divers syndicats, parties intéressées.

Dossiers du Conseil: 560-303  
560-305  
585-516

Décision n° 1058

Les présents motifs portent sur une demande d'ajournement de trois demandes dont est saisi le Conseil, soit deux demandes visant à obtenir une déclaration d'employeur unique aux termes de l'article 35 du Code et une demande visant à obtenir une déclaration de vente d'entreprise de la Compagnie des chemins de fer nationaux du Canada à AMF Technotransport Inc. (AMF) aux termes de l'article 44 du Code.

Le Conseil doit déterminer la question préliminaire de savoir si le Conseil a la compétence constitutionnelle voulue pour trancher les demandes. AMF a déposé à la Cour supérieure du Québec une requête en jugement déclaratoire voulant que son entreprise relève de la compétence provinciale. Cette requête doit être entendue le 14 mars 1994.

Le Conseil a exercé son pouvoir discrétionnaire de ne pas ajourner la procédure compte tenu de sa politique de ne pas ajourner de procédures en attendant les décisions des tribunaux. Dans la présente affaire, il n'est pas question de révision judiciaire comme telle puisque le redressement recherché par AMF est une déclaration d'ordre général. Étant donné que, lors de l'audience sur la requête en jugement déclaratoire, le Syndicat national des travailleurs et travailleuses de

of regular action, it is not expected that the Court could make a prompt determination of the constitutional question.

The Board's application to intervene in the proceedings before the Superior Court does not imply that the Board takes any position on the constitutional question or on any other question that might arise.

For these reasons, the Board denies the request for adjournment and will proceed with the hearing of evidence on the constitutional question.

l'automobile, de l'aérospatiale et de l'outillage agricole du Canada présentera probablement une requête en vue de transformer l'affaire en poursuites ordinaires, nous ne prévoyons pas que la Cour se prononcera rapidement sur la question constitutionnelle.

La demande d'intervention présentée par le Conseil en Cour supérieure ne veut pas dire que le Conseil prend position quant à la question constitutionnelle ni quant à toute question qui pourrait surgir.

Pour ces motifs, le Conseil rejette la demande d'ajournement et tiendra l'audience prévue sur la question constitutionnelle.

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Travail

Reasons for decision

National Automobile, Aerospace  
and Agricultural Implement  
Workers Union of Canada

and

International Association of  
Machinists and Aerospace  
Workers,

applicants,

and

Canadian National Railway  
Company Limited and AMF  
Technotransport Inc.,

respondent employers,

and

various unions,

interested parties.

Board files: 560-303  
560-305  
585-516

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The Board was composed of Mr. J.F.W. Weatherill, Chairman, and Mr. François Bastien and Ms. Sarah F. FitzGerald, Members. A hearing in this matter was held at Montréal on March 2, 1994.

Appearances

Messrs. S. Waller, A. Rosner and R. Pear, for the National Automobile, Aerospace and Agricultural Implement Workers Union of Canada;

Messrs. P. Hunt and S. Gaudet, for the International Association of Machinists and Aerospace Workers;

Messrs. A. Loranger and M. René de Cotret, for AMF Technotransport;

Messrs. J. Coleman and J. Pasteris, for Canadian National Railway Company Limited;

Mr. C. Ekision, for the International Brotherhood of Electrical Workers; and

Mr. R. Moreau, for the Canadian Brotherhood of Railway, Transport and General Workers.

These reasons for interlocutory decision were written by Mr. J.F.W. Weatherill, Chairman.

## I

These reasons deal with a request for adjournment of three applications presently before the Board, which have been set down for hearing and are to be heard together. Two of the applications, one brought by the National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW) and one by the International Association of Machinists and Aerospace Workers (IAM), seek a declaration by the Board pursuant to section 35 of the Code that the respondents are a single employer within the meaning of that provision. The other application, brought by the IAM pursuant to sections 44 and 46 of the Code, seeks a determination by the Board that there has been a sale of business within the meaning of section 44 from Canadian National Railway Company Limited (CNR) to AMF Technotransport Inc. (AMF).

As this is an interlocutory procedural decision with respect to a preliminary objection to the Board's proceeding, we will not dwell at length on the nature of the substantive issues which these applications raise or the circumstances which have given rise to them. We consider that it is important, however, to outline briefly the context in which these applications have been made: while labour relations considerations may have no significant bearing on the determination of the merits of the constitutional question which arises, they are appropriate to be considered in making the procedural determination which we must now make.

In May 1990, the respondent CNR filed an application with

the Board pursuant to section 18 of the Code, seeking to review the bargaining units in its shops across Canada. At the time of the application, shopcraft employees were organized in six bargaining units, and the employer sought to have these reduced to one. After lengthy hearings throughout 1991, the Board, on July 10, 1992, issued a decision (Canadian National Railway Company (1992), 88 di 139 (CLRB no. 945)) granting the application and determining that one bargaining unit was appropriate. There followed various applications and determinations with respect to the matter of representation rights. On August 5, 1993, a vote was ordered among employees in the bargaining unit. The vote has not yet been held, principally because the employment status of persons working at the AMF facility - a significant proportion of the persons coming within the shopcraft bargaining unit which had been the subject of the Board's proceedings - is in question. Votes were also ordered in similar applications involving Canadian Pacific Railway Company and VIA Rail Canada Inc., where bargaining units were also consolidated. Those votes are taking place at the time of writing of these reasons.

For labour relations reasons we would consider it desirable (although we put it no higher than that) that these votes be held, or at least the ballots counted, concurrently.

It is common ground between the parties that on August 30, 1993, the respondent AMF was incorporated. It would appear to be a wholly-owned subsidiary of the respondent CNR. However that may be, on September 1, 1993, AMF acquired from CNR its industrial complex in Montréal known as the Pointe Saint-Charles shops. It is said that AMF carries on operations at this facility using

substantially the same work-force as that which CNR had employed there.

The present applications, and others before this Board, were made following the announcement of the incorporation of AMF, and its undertaking of operations at the Pointe Saint-Charles facility.

The respondents have taken the position that AMF does not constitute a federal work, undertaking or business, and that this Board accordingly lacks jurisdiction to hear these applications or to grant the relief asked. The applicants take a contrary position. It will be necessary for the Board to deal with this preliminary question in order to determine whether or not to proceed.

Another trade union, the Canadian Brotherhood of Railway, Transport and General Workers (CBRT & GW), which had not been affected by the Board's earlier proceedings, but which had been certified by this Board in respect of another group of employees of CNR, including employees at Pointe Saint-Charles, applied to the Quebec Labour Commissioner for certification for a unit of employees of AMF equivalent to the group it represented at Pointe Saint-Charles. This application was, it appears, unopposed, and was granted. The CAW and IAM, the applicants in the present cases, also applied to the Quebec Labour Commissioner for certification in respect of "industrial" bargaining units of a type similar to that which this Board had determined to be appropriate for all CNR shopcraft employees. These latter applications were subsequently withdrawn. The CAW and IAM had concurrently (or roughly so) made the present applications to this Board in September 1993.

At first, the applicants had requested the Board to hold the present applications in abeyance, but in late November 1993, it was requested that the Board proceed. Written representations have been made by the parties with respect to the respondents' preliminary objection to the Board's jurisdiction. On February 7, 1994, the respondent AMF filed a motion with the Superior Court of Quebec for a declaratory judgment that its operations came under provincial jurisdiction. That application is to be heard on March 14, 1994.

This Board has requested the Superior Court to allow it to intervene, as amicus curiae, in the proceedings before the Court. In its request, the Board states that it will be taking no position with respect to the merits of the constitutional question. Of course, the Board could not properly have any position on that question, since although written arguments have been made and the Board is not required to hold a public hearing, the Board has made it clear by its notice of hearing that it intends to hear evidence and argument on the question.

Contrary to what was argued by counsel for each of the respondents, the fact that the Board seeks to intervene in the motion to the Superior Court does not imply the prejudging of either the constitutional question or the question of whether or not an adjournment should be granted. The Board's request does not signify that the Board has somehow made itself the "ally" or "associate" of one of the parties, nor can it now be said to be acting as "judge in its own cause", since in the present proceedings the question is whether or not or in what way the Board would exercise its discretion, whereas in the proceedings before the Superior Court the Board would raise certain institutional interests.

Counsel for CNR argued, in effect, that he had been denied a fair hearing on the question of adjournment because the Board, in seeking to intervene in the proceedings before the Superior Court, had thus indicated that it had taken a position on that question. This argument is, for the reasons given above, fallacious. Further, at the hearing on March 2, 1994, all other parties addressed the issue of adjournment, the notice of hearing itself having indicated that that would be a primary purpose of the hearing.

Where, in a proceeding before this Board, a question of fundamental jurisdiction arises, it is the usual practice for the Board to determine that question as a preliminary matter. Such determination is not, of course, protected by any privative clause. The Board has, over the years, made a great many determinations of this sort, accepting or declining jurisdiction in consequence. The question of whether or not the Board should adjourn its proceedings where such a question may concurrently be before a court has arisen several times. It is not the Board's general policy to adjourn its proceedings pending court challenges. See House of Commons et al. (1985), 62 di 225; 11 CLRBR (NS) 43; and 85 CLLC 16,065 (CLRB no. 536), where the Board said:

*"Where the delay is short, and the Board perceives no prejudice to the parties, the Board may delay pending a court decision, but these are exceptions to the general rule that the Board does not stop its own deliberations pending court challenges. A fortiori, the mere threat or possibility of a court challenge should not influence the Board."*

The reasons for this general policy are obvious. If a party can prevent the Board from proceeding simply by launching a court challenge, the Code, and the rights it confers, will for all practical purposes, be undermined. The Board must, before all else, decide the issues that Parliament has mandated it to decide. If the Board is overturned in court, then obviously it must abide by that

*decision, but unless and until that happens  
the Board must assume that what it is doing is  
valid. . . . "*

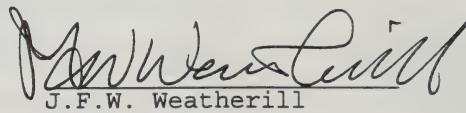
(pages 233-234; 51-52; and 14,435)

In the instant case, there is no "court challenge" to the Board's proceedings as such. Rather, the respondent AMF seeks a general declaration by the Superior Court with respect to its constitutional status. Counsel for the CAW advised the Board that on the return of the motion before the Superior Court, a motion would be made to convert the matter into one of regular action, in which it was expected considerable evidence and argument might be put forward.

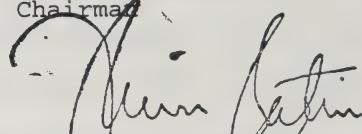
Considerable evidence as to the operations at the Pointe Saint-Charles facility was put before a (somewhat differently constituted) panel of this Board in the CNR bargaining unit review application referred to earlier. The transcript of those proceedings was referred to by counsel for CAW in the present application. The constitutional question is essentially a factual one, and the criteria on which any decision should be based have been clearly elaborated by the courts, including recent decisions of the Supreme Court of Canada. There is no question as to the constitutionality of legislation, but rather of its application in the circumstances. This is, as we have said, a question of a sort which this Board has frequently dealt with; in the instant case, the question arises in an industrial context with which the Board is familiar and it affects questions of representation rights and individual employees' rights with respect to which there is considerable urgency.

For all of the foregoing reasons, and in the exercise of its discretion, the Board denies the request of the

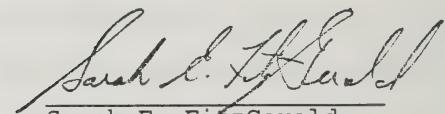
respondents for an adjournment of these matters. The Board intends to proceed on the dates set out in the notice of hearing.



J.F.W. Weatherill  
Chairman



François Bastien  
Member



Sarah E. FitzGerald  
Member

DATED AT OTTAWA, this 9<sup>th</sup> day of March 1994.

CLRB/CCRT - 1058

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## Summary

George Boulos, *complainant*, Canada Post Corporation, *employer*, and Canadian Union of Postal Workers, *respondent*.

Board File: 745-4434  
CLRB/CCRT Decision no. 1059  
April 18, 1994

## Résumé

George Boulos, *plaignant*, Société canadienne des Postes, *employeur*, et Syndicat canadien des postiers, *intimé*.

Dossier du Conseil: 745-4434  
CLRB/CCRT Décision n° 1059  
le 18 avril 1994

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This case deals with a complaint filed against the Canadian Union of Postal Workers, alleging violation of the duty of fair representation provisions found in section 37 of the Code.

The union had not replied to the Board's numerous requests for comments on the complainant's allegations dealing with the reasons why his grievance had not proceeded to arbitration. Given the state of the file on hand, the Board had to hold a hearing.

The union representative's testimony convinced the Board that there had not been a violation of section 37 of the Code. Consequently, the Board dismissed the complaint. However, a written document, as the Board had been requesting for months, could easily have replaced the testimony, and the hearing held in Vancouver would have been cancelled, thereby sparing the parties useless costs. The employer brought out the union's indifference and requested compensation for damages.

Il s'agit d'une plainte déposée contre le Syndicat canadien des postiers, alléguant violation de l'article 37 du Code qui porte sur le devoir de représentation juste.

Le syndicat n'avait pas répondu aux nombreuses demandes du Conseil de commenter les allégations du plaignant sur les raisons pour lesquelles son grief n'avait pas été acheminé à l'arbitrage. Étant donné l'état du dossier, le Conseil a dû tenir une audience.

Le représentant du syndicat a rendu un témoignage qui a convaincu le Conseil qu'il n'y avait pas eu violation de l'article 37 du Code. Le Conseil a donc rejeté la plainte. Cependant, le témoignage aurait facilement pu être remplacé par un document écrit, ce que le Conseil réclamait en vain depuis plusieurs mois et l'audience qui a eu lieu à Vancouver aurait alors été annulée, épargnant ainsi aux parties de lourdes dépenses inutiles. L'employeur a fait ressortir l'insouciance du syndicat et a demandé compensation des dommages subis.



After having reviewed the doctrine and case law on this matter, the Board found that it did not have jurisdiction to award costs when there is no violation of the Code.

The Board added that the union, by failing to defend itself against a section 37 complaint, had not violated any provisions of the Code, and that therefore the Board apparently did not have the authority to award costs in the circumstances of this case.

Le Conseil, après avoir revu la doctrine et la jurisprudence sur ce sujet, juge qu'il n'a pas compétence pour ordonner le paiement des frais lorsqu'il n'y a pas eu de violation du Code.

Le Conseil ajoute que le syndicat est négligent de se défendre contre une plainte fondée sur l'article 37 ne viole aucune disposition du Code, de sorte que le Conseil n'a apparemment pas le pouvoir d'accorder des frais contre le syndicat dans les circonstances de la présente affaire.

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Relations du  
Travail

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## Reasons for Decision

George Boulos

*complainant,*

*and*

Canada Post Corporation,

*employer,*

*and*

Canadian Union of Postal Workers,

*respondent.*

Board File: 745-4434

Decision No. 1059

April 18, 1994

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The Board was composed of Mr. Jean L. Guilbeault, Q.C., Vice-Chair, and Messrs. Robert Cadieux and Patrick H. Shafer, Members. A hearing into this matter was held at Vancouver on November 2, 1993.

### Appearances

Mr. George Boulos, on his own behalf; and

Mr. Robert Borch, National Director, Metro-Toronto Region, for the Canadian Union of Postal Workers; and

Mr. Ian Szlazak, Senior Counsel, for Canada Post Corporation.

These reasons for decision were written by Mr. Jean L. Guilbeault, Q.C., Vice-Chair.

This case deals with a complaint filed pursuant to section 97(1) of the Canada

Labour Code alleging that the Canadian Union of Postal Workers (CUPW) violated section 37 of the Code.

The complainant, George Boulos, has worked as a call casual mail clerk for Canada Post Corporation (Canada Post) since August 1990. During a lawful strike in the summer of 1991, the complainant crossed the picket line, not as replacement worker but as a call casual mail clerk.

On August 7, 1992, the complainant stated that he was involved in an incident, with verbal and physical violence, with two fellow co-workers, one of whom was David Bleakney, a union steward who insulted him by calling him a scab. Mr. Bleakney immediately complained to the area supervisor. A few days later the complainant, who had not been disciplined nor reprimanded before this incident, was suspended from work, while the two other employees involved were neither disciplined nor reprimanded.

The complainant tried to grieve his suspension; all his efforts and attempts, even to speak to union officials, were ignored.

Meanwhile, the indefinite suspension of August 7, 1992 was waived for humanitarian reason and the complainant resumed his duties on September 17, 1992. After working one shift he resigned.

On October 2, 1992, the complainant filed a grievance stating that his suspension was unjust. His grievance was never sent to arbitration for reasons unknown to the Board until a hearing was held in Vancouver where CUPW, represented by Robert Borch, revealed what the union had done about the complainant's grievance and why it had remained silent on that matter.

Mr. Borch testified that he had received the file one week before the hearing.

While referring to the file, he explained in detail what had happened to the complainant's grievance during the grievance process and why the union had concluded, after a grievance hearing held in October 1992, that the case had very little chance of success at arbitration.

The union has a backlog of some 130 000 grievances. Mr. Mitchell, formerly with the union, knew more about this present case, but he left the union in June 1993 and was replaced by Mr. Cameron who, for unknown reasons, did not pursue the matter.

While presenting his arguments, M. Szlazak maintained that relief ought to be granted to the employer, his client, should the complaint be upheld, and made references to the responsibility for damages. The Board then requested that both parties submit, in writing, their notes and authorities on that subject, which they did within the prescribed time limit.

### The Facts

The parties exchanged correspondence from the date the complaint was filed, February 19, 1993, up to the hearing of the matter on November 2, 1993.

After having acknowledged receipt of the complaint, the Board, in a letter dated May 20, 1993 to Mr. A. Kolompar, CUPW's Toronto Local President, referred to several attempts to get the union's submissions and warned that the Board's investigating officer would prepare his report regardless of whether or not the union had filed its submissions with the Board. The correspondence that followed indicates that the union did not communicate with the Board until the hearing when Robert Borch took the stand to testify.

Canada Post submitted that, had the union communicated in a timely fashion by writing to the Board what Mr. Borch had said at the hearing, the Board could have dealt with this complaint without a hearing, thus saving the costs involved in holding the hearing in Vancouver, where all parties were present.

The employer criticized the union for its silence and indifference and submitted that regardless of the findings on the merits of the complaint, the Board has the power to award the employer costs for attending the hearing.

The Board will first consider the complaint under section 37 of the Code. After reviewing the material on file and after examining all testimonies, the Board determined that the union did not violate section 37 of the Code by refusing to take the complainant's grievance to arbitration.

The union has the discretion to decide whether a grievance will proceed or not to arbitration. (See David Coull (1992), 89 di 64; and 17 CLRBR (2d) 301 (CLRB no. 957).)

Pursuant to section 37, the Board must satisfy itself that the union's decision is not made in an arbitrary manner, is not motivated by bad faith and is not one in which the complainant has been the victim of discrimination.

The Supreme Court of Canada identified the fundamental principles of the union's duty of fair representation in Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509; (1984), 9 D.L.R. (4th) 641; and 84 CLLC 14,043:

*"The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*

- 1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
- 2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
- 3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*
- 4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*
- 5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."*

(pages 527; 654; and 12,188)

In view of the above facts, the tests to be applied and the Board's role under section 37, the Board, although sympathizing with the complainant, concluded that CUPW did not violate section 37 of the Code.

The Board may be displeased with the way the union handled the case by ignoring the Board officer's repeated requests for information, but nevertheless the Board has no legal power to discipline the union for failing to reply to the complaint in a timely manner.

Since the Code does not expressly provide for the specific power to award costs, one must therefore fall back on the Board's general power to make such orders as are necessary to remedy or counteract the consequences of a violation

of the Code. This power is conferred by section 99(2) of the Code which reads as follows:

*"99. (2) For the purpose of ensuring the fulfilment of the objectives of this Part, the Board may, in respect of any contravention of or failure to comply with any provision to which subsection (1) applies and in addition to or in lieu of any other order that the Board is authorized to make under that subsection, by order, require an employer or a trade union to do or refrain from doing any thing that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of those objectives."*

(emphasis added)

As affirmed by the Federal Court of Appeal and the Supreme Court of Canada (Teamsters Union Local 938 et al. v. Gerald M. Massicotte et al., [1982] 1 F.C. 216; (1980), 119 D.L.R. (3d) 193; and 34 N.R. 611; and Teamsters Union Local 938 et al. v. Gerald M. Massicotte et al., [1982] 1 S.C.R. 710; (1982), 134 D.L.R. (3d) 385; and 82 CLLC 14,196), section 99(2) of the Code gives the Board broad remedial powers in addition to those conferred by section 99(1)(b). However, a remedy ordered by the Board must be authorized by section 99(2), that is, it must bear some relation to the alleged wrongdoing and its consequences. In fact, in National Bank of Canada v. Retail Clerks' International Union et al., [1984] 1 S.C.R. 269; (1984), 9 D.L.R. (4th) 10; and 84 CLLC 14,037, Chouinard, J., had rightly defined the scope of this section:

*"The fact remains that a remedy ordered pursuant to s. 189 must be one authorized by that section. In my view, it is essential for there to be a relation between the unfair practice, its consequences and the remedy."*

(pages 288; 25; and 12,158; emphasis added)

Recognizing, moreover, the importance of the remedial nature of an order issued under section 189 (now 99(2)) of the Code, the Board concluded, in National Bank of Canada (1984), 56 di 107; and 84 CLLC 16,038 (CLRB no. 466), that it had the power to award costs against a party. The Board said the following:

*"It is easy to see how an order for costs could remedy or counteract a consequence of a failure to comply within the meaning of section 189. If there had been no breach, there would have been no need to initiate proceedings before the Board, and the associated costs would never have been incurred. An order for costs would directly counteract that consequence. It is therefore clear there is jurisdiction to order costs under section 189."*

(pages 118; and 14,333; emphasis added)

The Board added, however, that if no violation of the Code was established, it could not order a remedy.

Even though the Board can award costs, it does not do so in complaint proceedings, even in extreme cases. In fact, awarding costs would result in identifying a winner and a loser, which is not beneficial to re-establishing healthy labour relations in an already unsettled atmosphere.

This policy seems consistent with Robert W. Kerr's explanation of the practice of labour relations boards of not awarding costs. He gives the following principal reasons:

*"Boards have expressed concern that the award of costs to a successful complainant would be perceived as unfair unless costs against unsuccessful complainants are also awarded. The possibility of an award of costs against a complainant, on the*

*other hand, could be serious deterrent to the bringing of a complaint."*

(Rober W. Kerr, Labour Relations Board Remedies in Canada  
(Aurora, Ont.: Canada Law Book, 1993), page 9-62)

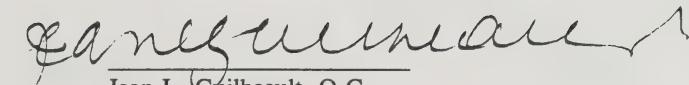
In the present case, the Board did not, under section 16(a) of the Code, order the union to appear before it and to produce documents. Moreover, to the extent that the Board has the power to order a remedy only if it finds there has been a violation of the Code, and since nothing in the Code obliges a union to defend a complaint filed against it, the Board apparently has no power to award the employer costs against the union.

In the light of the foregoing, it follows that an order awarding the employer costs against the union would constitute an excess of jurisdiction and a breach of the Board's policy on this matter.

#### Conclusion

There was no evidence in this present case that the union acted with deliberate bad faith in handling the complainant's grievance and the Board determined that the union did not breach its duty of fair representation, under section 37 of the Code. Therefore, the Board dismissed the complaint and, by doing so, must refuse the payment of costs and damages to the employer in accordance with the Code and with its policy regarding this matter.

This is a unanimous decision.



Jean L. Guilbeault, Q.C.  
Vice-Chair



Robert Cadieux  
Member



Patrick H. Shafer  
Member



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## Summary

Jerry Sabo, *complainant*, Transportation Communications International Union, *respondent*, and Canadian Parcel Delivery (CANPAR), a division of Canadian Pacific Express and Transport Ltd., *employeur*.

Board File: 745-4543  
CLRB Decision no. 1060  
March 31, 1994



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## Résumé

Jerry Sabo, *plaintif*, Syndicat international des transports-communication, *intimé*, et Livraison canadienne de colis (CANPAR), une division de Canadien Pacifique Express et Transport Ltée, *employeur*.

Dossier du Conseil: 745-4543  
CCRT Décision n° 1060  
le 31 mars 1994

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The complainant alleged that the respondent union breached its duty of fair representation (section 37 of the Canada Labour Code - Part I - Industrial Relations) when it did not deal with his termination grievance.

The facts of the case led the Board to conclude that the union failed to represent the complainant. The Board stated that it could not accept, as fair representation, what amounts essentially to a total lack of representation.

The complaint is allowed.

Le plaignant allègue que le syndicat intimé a enfreint son devoir de représentation juste (article 37 du Code canadien du travail - Partie I - Relations du travail) lorsqu'il ne s'est pas occupé du grief relatif à son congédiement.

Les faits de l'affaire mènent le Conseil à conclure que le syndicat n'a pas représenté le plaignant. Le Conseil a déclaré qu'il ne pouvait accepter comme une représentation juste ce qui ne constitue en fait qu'une absence totale de représentation.

La plainte est accueillie.

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Canada  
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Relations  
Board

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Conseil  
Canadien des  
Relations du  
Travail

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## Reasons for decision

Jerry Sabo,

*complainant,*

*and*

Transportation-Communications International Union,

*respondent,*

*and*

Canadian Parcel Delivery (d.b.a. CANPAR), a Division of Canadian Pacific Express and Transport Ltd.,

*employer.*

Board File: 745-4543

Decision no. 1060

March 31, 1994

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The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chairman, and Messrs. Michael Eayrs and Patrick H. Shafer, Members. A hearing was held in Calgary, Alberta, on March 3 and 4, 1994.

### Appearances

Mr. Jerry Sabo, on his own behalf;

Mr. David McKee, for the Transportation-Communications International Union; and Mr. Michael D. Failes, for Canadian Parcel Delivery (d.b.a. CANPAR), a Division of Canadian Pacific Express and Transport Ltd.

These reasons for decision were written by Mr. Richard I. Hornung, Q.C., Vice-Chairman.

I

The applicant, Jerry Sabo, alleges that the respondent union breached its duty of fair representation pursuant to section 37 of the Code.

II

The relevant facts can be briefly summarized.

Jerry Sabo, a CANPAR employee, was a member of the Transportation-Communications International Union (the union). On March 13, 1993, he received a registered letter, dated March 5, from CANPAR dismissing him from his employment.

After receiving the letter, he called the union's Local Chairman, Kirk Greasley, on three or four occasions prior to March 25, 1993, to request his assistance. We conclude that on these occasions he left messages for Mr. Greasley to return his calls. However, Mr. Greasley did not do so.

Receiving no response from the union, Jerry Sabo wrote to Debbie Gilmet, Customer Services Supervisor at CANPAR, complaining of both his dismissal and the company's failure to provide him with a "bumped" position earlier in 1992. Copies of this correspondence were sent both to Kirk Greasley and Jack Crabbe, union president.

On receipt of his copy of the letter, Mr. Greasley simply filed it away insofar as he thought it dealt with "other matters." However, in his testimony he admitted that in hindsight he should have done something about it.

On April 17, 1993, Mr. Sabo again wrote directly to Mr. Greasley to complain about his dismissal (Exhibit 8(6)). A copy of the correspondence was also sent to the union president.

Mr. Greasley did nothing about the letter or Mr. Sabo's complaint. In his testimony, he agreed again that, on reflection, he clearly should have done something. However, he believed that the operative time period for bringing a grievance on behalf of Mr. Sabo was 14 days and, accordingly, any grievance would be out of time. At the hearing, he acknowledged that the operative time period for a dismissal grievance, which categorization would describe Mr. Sabo's fate, was not 14 days, but rather 42 days as per Article 6.6 of the collective agreement.

John Bechtel, union vice-president, Trucking Division, confirmed in his testimony that looking at the letter of April 17, 1993, Mr. Greasley should have concluded that there was action to be taken on Mr. Sabo's behalf.

Mr. Greasley admitted that he had received the letter of April 17 three or four days later. Based on the 42-day time limit set forth in Article 6.6, he would have had sufficient time to file a grievance or take any other appropriate action. However, he did not; nor did he call Mr. Sabo or the company or investigate Mr. Sabo's complaint. Essentially, based on a now admittedly incorrect interpretation of the collective agreement, he decided that nothing could be done for Mr. Sabo.

Mr. Greasley's lack of understanding of the collective agreement is further underscored by his earlier failure, in July and October 1992, to take appropriate action to ensure Mr. Sabo's bumping rights with respect to a position in Medicine Hat. There is no need to detail the provisions of the collective agreement or the circumstances; however, at the hearing, Mr. Greasley agreed that although the provisions of Article 5.2.3 of the collective agreement as he now understood them, would have provided Mr. Sabo with the appropriate bumping rights, he did not properly understand the terms of the collective agreement when Mr. Sabo brought the

complaint to him in 1992. Regrettably, however, in the circumstances, any complaint by Mr. Sabo as it relates to the "bumping" episode of 1992 is proscribed by the time limit contained in section 97(2) of the Code. However, the complaint as it refers to the dismissal is timely.

### III

A bargaining agent's duty of fair representation is statutorily expressed in section 37 of the Code:

*"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."*

The Supreme Court of Canada in Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509; (1984), 9 D.L.R. (4th) 641; and 84 CLLC 14,043, established the following criteria to which a bargaining agent should adhere when handling grievances:

*"The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*

- 1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
- 2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*

*3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*

*4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*

*5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."*

(pages 527; 654; and 12,188; emphasis added)

A union's duty of fair representation is the necessary corollary of its right to exclusive representation of the employees in the bargaining unit. Because employees who join a union forfeit their individual rights, the union, regardless of its level of sophistication, has a clear duty to represent fairly all of its members in grievance situations.

Where the grievance involves a dismissal, the union's obligation to represent the employee is of a much higher standard. In such cases, the decision not to process the grievance must be based on a careful and informed study of, and conscientious attention to, the substance of the case (see Brenda Haley (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 (CLRB no. 304); and André Cloutier (1981), 40 di 222; [1981] 2 Can LRBR 335; and 81 CLLC 16,108 (CLRB no. 319)).

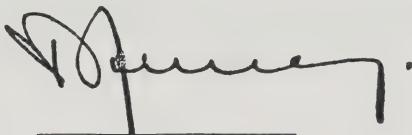
As stated by this Board in Malcolm Horton (1993), as yet unreported CLRB no. 1015 at page 11: "We cannot accept as fair representation what amounts, essentially, to a total lack of representation."

By the admission of both Messrs. Greasley and Bechtel, the union had not turned its mind to Mr. Sabo's rights contained in the collective agreement, nor did it understand the redress available to Mr. Sabo under the terms of that agreement. By not responding to Mr. Sabo's request for action, and then by refusing to proceed with a grievance - based on what he now concedes was an incorrect interpretation of the collective agreement - without any proper understanding or appropriate review of the rights available to the union or employee under that agreement, Mr. Greasly acted in an arbitrary fashion and breached section 37.

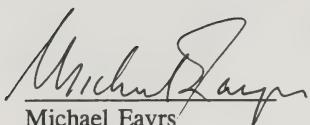
In the circumstances, we allow the complaint. Pursuant to section 99(1)(b) of the Code, the Board makes the following orders.

1. The union will refer the dismissal grievance to arbitration forthwith.
2. Any time limits under the collective agreement which might be a bar to the arbitration are hereby waived.
3. The complainant, Mr. Sabo, is entitled to be represented at arbitration by counsel of his choosing. The union will pay all reasonable legal fees and expenses for such representation.
4. Should Mr. Sabo succeed at arbitration, the arbitrator will determine the question of what compensation, if any, payable to Mr. Sabo for the period between the date of his termination and the date of this decision.

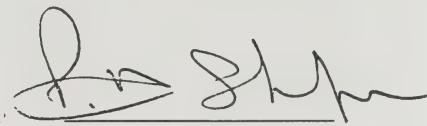
5. The Board will retain jurisdiction with respect to the implementation of this order.



Richard I. Hornung, Q.C.  
Vice-Chairman



Michael Eayrs  
Member



Patrick H. Shafer  
Member



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## Summary

Canadian Union of Postal Workers, *applicant*, and Canada Post Corporation and Air Canada, *respondents*, and International Association of Machinists and Aerospace Workers, Local 148, *interested party*.

Board Files: 560-301, 585-510  
CLRB/CCRT Decision no. 1061  
March 31, 1994

## Résumé

Syndicat des postiers du Canada, *requérant*, et la Société canadienne des postes et Air Canada, *intimés* et l'Association internationale des machinistes et des travailleurs de l'aérospatiale, section locale 148, *partie intéressée*.

Dossiers du Conseil: 560-301, 585-510  
CLRB/CCRT Décision n° 1061  
le 31 mars 1994

Interlocutory decision dismissing CUPW's objection to Board Member Mary Rozenberg's sitting in this application pursuant to sections 35, 44 and 45 of the Canada Labour Code (Part I - Industrial Relations). The ground for this request for disqualification is an alleged reasonable apprehension of bias on Board Member Rozenberg's part because of her employment as a Labour Relations Officer with the Canada Post Corporation from August 1984 until May 1988.

Décision interlocutoire rejetant l'opposition du SPC à la participation du Membre Mary Rozenberg au banc du Conseil saisi d'une demande présentée en vertu des articles 35, 44 et 45 du Code canadien du travail (Partie I - Relations du travail). Le syndicat fonde sa demande d'exclusion sur un doute soi-disant raisonnable quant à l'impartialité du Membre Rozenberg du fait que cette dernière a occupé les fonctions d'agent de relations de travail à la Société canadienne des postes de août 1984 à mai 1988.

Applying the "reasonable apprehension of bias" test established by the Supreme Court of Canada, the Board considered that:

1. the Board Member has had no involvement with the matter in issue;
2. the relationship between the Board Member and CPC was remote in time; and

Appliquant le critère de «doute raisonnable quant à l'impartialité» établi par la Cour suprême du Canada, le Conseil estime que:

1. le membre du Conseil n'a été d'aucune façon lié à la question en litige;
2. le lien qu'il y avait entre le membre du Conseil et la Société n'existe plus depuis longtemps; et

3. there was no evidence with respect to the Board Member's views on the issues.

Consequently, the Board concludes that no person could, in these circumstances, have a reasonable apprehension of any bias on the part of Board Member Rozenberg.

3. aucune preuve n'a été présentée concernant l'avis du Membre sur les questions.

Le Conseil conclut donc qu'il ne peut y avoir dans les circonstances, aucun doute raisonnable quant à l'impartialité du Membre Rozenberg.

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## Reasons for decision

Canadian Union of Postal Workers,

*applicant,*

*and*

Canada Post Corporation,

*and*

Air Canada,

*respondents,*

*and*

International Association of Machinists and  
Aerospace Workers, Local 148,

*interested party.*

Board Files: 560-301, 585-510

Decision no. 1061

March 31, 1994

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The Board was composed of Mr. J.F.W. Weatherill, Chairman, and Ms. Mary Rozenberg and Mr. Michael Eayrs, Members. A hearing was held on March 23 and 25, 1994, at Toronto.

### Appearances

Mr. T. McDougall and Ms. B. Nicholls, for the applicant;

Mr. J. West, Ms. D. Monaghan and Mr. J. Deveen for Canada Post Corporation;

Mr. G. Delisle, for Air Canada; and

Mr. B. Shipman, for the International Association of Machinists and Aerospace Workers, Local 148.

This interlocutory decision was written by Mr. J.F.W. Weatherill, Chairman.

Interlocutory Decision

The applicant, the Canadian Union of Postal Workers (CUPW), has applied pursuant to sections 35, 44 and 45 of the Canada Labour Code for a declaration that the respondents, the Canada Post Corporation (CPC) and Air Canada, constitute a single employer for the purposes of the Code and a declaration that the collective agreement between CUPW and CPC applies to Air Canada or, in the alternative, a declaration that there has been a sale of business or of part of a business from CPC to Air Canada, and for ancillary relief. The application arises from the alleged contracting out of certain work at CPC's Air Mail Facility at the Pearson airport in Toronto to Air Canada.

At the outset of the hearing, counsel for the applicant requested that Board Member Rozenberg disqualify herself, and that the matter be heard by a differently constituted panel of the Board. The ground for this request was an alleged reasonable apprehension of bias on the part of Board Member Rozenberg, although it was made clear there was no suggestion of any actual bias on her part. The basis for such alleged apprehension is the fact that Board Member Rozenberg worked as a labour relations officer for CPC from August 1984 until May 1988. During that period, Ms. Rozenberg had many dealings with CUPW in her capacity as labour relations officer and attended various meetings relating to many types of labour relations matters, including some involving station closures related to the CPC's franchising activities. It should be noted, however, that Ms. Rozenberg had no involvement with the particular circumstances which are the subject of this application, and which arose several years after she left CPC's employ.

Evidence was heard from two union officers - the Fifth National Vice-President and the President of the Toronto local - to the effect that they were under some apprehension of bias on the part of Ms. Rozenberg. None of the evidence indicated anything more than what has been described, namely that Board Member Rozenberg had been employed by CPC and had worked as a labour relations officer on various

matters involving CUPW, some of which related to problems between the parties involved in certain station closures or similar situations. It is clear that Ms. Rozenberg's role in such matters was not at the policy-making level.

The alleged apprehension of bias was clearly put by Mr. Ash, CUPW's Fifth National Vice-President, who said in his testimony:

*"I'd have difficulty thinking she would not be biased against the union. The fractured relationship is one of extreme mistrust, and she was working for the Corporation during the time some of the contracting out occurred."*

The question is whether the apprehension of bias so expressed is a reasonable one.

\* \* \*

It was after some years of active involvement in the union movement that Ms. Rozenberg went to the CPC. She had been successively Vice-President and President of Canadian Union of Public Employees, Local 1953 (CUPE), Chairman of the Ontario Municipal Employees Coordinating Committee and, as such, a member of the CUPE Ontario Division Executive Board, and she participated in training programs for the Metropolitan Toronto Labour Council, the Ontario Federation of Labour and the Canadian Labour Congress. Mr. Ash testified that he was well aware of that background, but he said that his "concerns are based on her having chosen a different path."

In June 1988, Ms. Rozenberg was appointed to the Ontario Labour Relations Board, as a Member representing management. In September 1990, she was appointed a Member of this Board. Members of this Board are public Members, not representative of any point of view or interest, but sworn to administer fairly the provisions of the Canada Labour Code, one of whose fundamental purposes is the advancement of collective bargaining.

The test to be applied in a case such as this is that of reasonable apprehension of bias. This is the test applied by the Supreme Court of Canada in Committee for Justice and Liberty et al. v. National Energy Board (1976), 68 D.L.R. (3d) 716. In applying that test in the context of the work of a labour relations tribunal, it is helpful to consider what is written by George W. Adams, in Canadian Labour Law, 2d ed. (Aurora, Ont.: Canada Law Book Inc., 1993). At page 4-47, the test is described as being "an objective test based on whether a reasonable person, apprised of all the circumstances, would feel a reasonable apprehension of bias."

Mr. Adams goes on to make a number of explicative comments relating to administrative tribunals, at page 4-48. These include the following, which we present with our comments, as to their relationship to the instant case.

*"The specialized role of an administrative tribunal demands that its members have a developed knowledge and expertise in the particular industry or specialization. Appointments to tribunals are necessarily drawn from a population which has been actively involved in the field. Unless such expertise is to be denied in staffing these agencies, a prior professional association with a party or with counsel to a party in and of itself should not be and has not been a ground for establishing a reasonable apprehension of bias provided the adjudicator has had no involvement in the matter in question.*

..."

In the instant case, Board Member Rozenberg has of course had a prior professional association with one of the parties. She has had no involvement with the matter in issue here which of course distinguishes this case from Committee for Justice and Liberty.

*"... The remoteness of the relationship both in time and degree are, however, relevant factors. ..."*

In the present case, Board Member Rozenberg left the employ of the respondent CPC almost six years ago.

*"... The courts have, however, recognized that members appointed to a tribunal will have developed their own views as a result of their experience. Strong opinions do not constitute evidence of prejudgment and an apprehension of bias will be found only where the adjudicator appears to be closed to argument."*

In the present case, there is no evidence with respect to Board Member Rozenberg's views on the issue in question. There is no ground for considering that she is "closed to argument" in the instant case, nor was such a suggestion put forward.

\* \* \*

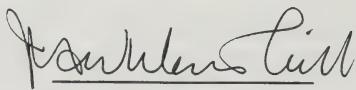
Having in the past served as counsel for one of the parties to a proceeding is not grounds for disqualification. In the recent Radio Futura Limitée (CKVL/CKOI) et al. (1992), 87 di 7; and 16 CLRBR (2d) 152 (CLRB no. 913), Vice-Chair Louise Doyon refused - quite correctly in our view - to disqualify herself from sitting in a case in which the applicant was a trade union for which she had, some years before, acted as counsel.

We are sensitive to one particular consideration advanced by counsel for the applicant: that the relationship between these parties (CPC and CUPW) has been, as several eminent mediators and arbitrators have said, a poisoned one or, as Mr. Ash put it in his evidence, a fractured one. This is common knowledge in the industrial relations community and indeed in the country at large. It is clear to us that the present application is based not on a reasoned view of the facts, but rather on that poisoned atmosphere. To allow the request that Board Member Rozenberg step down from this panel would be to accede to what is, to put the matter as objectively as possible, a prejudiced view, and to contribute to perpetuating that atmosphere.

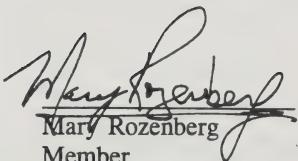
In our view, no reasonable person could, in the circumstances described, have a reasonable apprehension of any bias in this matter on the part of Board Member Rozenberg who, it may finally be noted has, on a number of occasions since her

appointment to this Board, sat in matters involving these parties without objection.

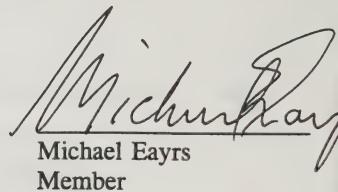
This request is without merit and is accordingly denied.



J.F.W. Weatherill  
Chairman



Mary Rozenberg  
Member



Michael Eayrs  
Member

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# Information

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## Summary

William McKay, *employee* and Canadian National Railway Company, *employer*.

Board File: 950-272  
CLRB/CCRT Decision no. 1062  
April 8, 1994

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This case deals with the referral of a safety officer's decision under section 129(5) of the Code (Part II) in which the safety officer had concluded that the employee's situation did not constitute a danger within the meaning of Part II of the Code.

The Board confirmed the safety officer's decision and held that no danger existed at the time of the safety officer's investigation.

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## Résumé

William McKay, *employé* et Compagnie des chemins de fer nationaux du Canada, *employeur*.

Dossier du Conseil: 950-272  
CLRB/CCRT Décision n° 1062  
le 8 avril 1994

---

Il s'agit ici du renvoi du paragraphe 129(5) du Code (Partie II) d'une décision d'un agent de sécurité qui avait conclu que les conditions de travail de l'employé ne présentaient aucun danger au sens de la Partie II du Code.

Le Conseil a confirmé la décision de l'agent de sécurité et a statué qu'il n'existant aucun danger au moment de l'enquête de l'agent de sécurité.



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LES MOTIFS DE DECISION DU CCRT SONT  
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## Reasons for decision

William McKay,

*employee,*

*and*

Canadian National Railway Company,

*employer.*

Board File: 950-272

Decision no. 1062

April 8, 1994

---

The Board was composed of Mr. Michael Eayrs, Member, sitting as a single member panel pursuant to section 156(1) of the Canada Labour Code (Part II - Occupational Safety and Health). A hearing was held on February 1, 1994, at Winnipeg, Manitoba.

### Appearances

Mr. William McKay, on his own behalf;

Mr. Max A. King, Legal Advisor, accompanied by Mr. Darrell W. Fierheller, Assistant Superintendent, and Mr. Philip Edwards, Safety and Loss Control Officer, for Canadian National Railway Company.

These reasons for decision were written by Mr. Michael Eayrs, Member.

### I

This case deals with the referral of a safety officer's decision requested by William McKay, an employee of Canadian National Railway Company (CN Rail) at its Transcona shop. The referral was made, in a timely fashion, pursuant to section 129(5), which reads as follows:

*"129. (5) Where a safety officer decides that the use or operation of a machine or thing does not constitute a danger to an employee or that a condition does not exist in a place that constitutes a danger to an employee, an employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing or to work in that place, but the employee may, by notice in writing given within seven days of receiving notice of the decision of a safety officer, require the safety officer to refer his decision to the Board, and thereupon the safety officer shall refer the decision to the Board."*

Mr. McKay, is an experienced pipefitter in CN Rail's employ since 1978, is fully trained in asbestos abatement work and has worked with asbestos during the past 15 years. In 1992, he successfully completed a course on asbestos abatement and the Workplace Hazardous Materials Information System and was certified as having done so.

On November 16, 1993, Mr. McKay was assigned to encapsulate a box car which had asbestos residue and refused the assignment. His stated reason for his refusal was "asbestos imposes danger to my health and my family's health." Another employee (who happened to be a pipefitter also trained in asbestos work) volunteered to do the encapsulation work and Mr. McKay was assigned to other duties.

By November 17, 1993, it had been determined that a significant asbestos encapsulation and clean-up program was required. When Mr. McKay reported to work that day, he was assigned to that program and again refused, giving essentially the same reasons as he had the day before. CN Rail treated the matter as a continued refusal to work, contacted Ceayon Johnston, Labour Affairs Officer with Labour Canada (a safety officer within the meaning of the Code), and was advised that prior to the involvement of the safety officer, the employer must conduct, in accordance with the Code, an investigation into Mr. McKay's refusal to work.

On November 18, 1993, the required investigation was conducted; Mr. McKay was temporarily removed from the asbestos abatement team and, on November 24, 1993,

Ms. Johnston was advised of Mr. McKay's continued refusal, subsequently conducted her investigation and issued the following decision:

*"6 Safety Officer's decision*

*Safety Officer's decision is based on the facts of the case and the definition of danger as defined by Part II of the Code.*

*danger: Any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected.*

*DECISION: ABSENCE OF DANGER*

*the employee's continued refusal cannot be upheld for the following reasons:*

- 1) *the employee is not refusing because a machine or thing or condition in the workplace poses a danger within the meaning of the Code BUT rather is refusing to work on any jobs involving asbestos REGARDLESS of the precautionary measures in place.*
- 2) *the employee is not refusing for a particular job or work process but all jobs involving asbestos.*
- 3) *the employee has received the requisite training, and information regarding the associated hazards and safe work practices involved in asbestos abatement.*
- 4) *the purpose of the Code is not to prevent employees from working with hazardous materials but to ensure precautions are taken to protect the safety and health of employees at work (also that good industrial hygiene practice is followed with respect to controls).*
- 5) *there is no danger within the meaning of the Code if safe work practices are adhered to."*

By letter dated November 29, 1993 Mr. McKay "appealed" the safety officer's decision and Ms. Johnston subsequently referred her investigation report, decision and all related documents to the Board, thus giving rise to the instant proceedings.

II

At its hearing into the matter, which was held in an informal manner, the Board heard from Mr. McKay and CN Rail and was assisted by Ms. Johnston.

Mr. McKay essentially confirmed the reasons for his refusal as given at the time it occurred and in the course of Ms. Johnston's investigation. It was, of course, on those reasons that Ms. Johnston based her investigation and subsequent decision.

Mr. McKay told the Board that he has, for some time, been trying to avoid work involving asbestos. He is concerned for his health and the health of his family, his primary concern being that he might ingest asbestos fibres or expose his family to asbestos fibres carried home on his person. He stated that his refusal to work was a calculated decision that he had discussed with his family and had been considering for some time prior to the November incidents. He also believed that four fellow workers have lung problems as a result of exposure to asbestos.

At the hearing, Mr. McKay volunteered that in his trade as a qualified pipefitter he realized a limited amount of asbestos handling was inherent in his work; for example work with pipe insulation. He also told the Board however that he had, unsuccessfully, been trying to "bid-out" of certain assignments (such as the one involved in the instant case) to avoid contact with asbestos. It may be noted that while Mr. McKay's reference to recognizing the relatively limited amount of asbestos work inherent in the pipefitting trade is at variance with his statement to Ms. Johnston that he had decided to refuse all asbestos work, it does not detract from the real reason for his refusal to work or the information given to Ms. Johnston on which she based her investigation and decision of "absence of danger."

In the course of her investigation, Ms. Johnston satisfied herself that Mr. McKay was in fact properly trained in asbestos abatement procedures and had at his disposal protective equipment and measures which met or exceeded established standards for

the work involved.

During the hearing, Mr. McKay freely admitted that protective equipment was available to him. He did mention his concern that the respirators provided are rated at 99.97% efficiency (as opposed to 100%) and that on "clean-up" work such as that which he had refused, proper shower facilities were not in place.

As noted by the safety officer, the respirators provided do meet or exceed established, and approved standards for the work, and CN Rail specified that temporary shower facilities were sometimes utilized due to the location of the work to be performed. In any event, it is clear from the safety officer's report and decision that she was looking into Mr. McKay's stated refusal to do any further asbestos work, rather than a specific task involving that material.

In summary, Mr. McKay feels that he was improperly assigned, out of classification and out of seniority, to do work he simply did not want to perform or be compelled to perform.

In response to the Board's question on this matter, CN Rail stated, in effect, that in a clean-up such as the one to which Mr. McKay was assigned, it utilized, without regard to classification, available employees properly trained in asbestos abatement. On the work refused by Mr. McKay, employees classified as pipefitter, electrician and sheet metal worker were among those assigned.

### III

According to section 128(1) of the Code, Mr. McKay has the initial right to refuse the work assigned to him in November. Section 128(1) of the Code reads as follows:

*"128.(1) Subject to this section, where an employee while at work has reasonable cause to believe that*

- (a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or*
- (b) a condition exists in any place that constitutes a danger to the employee, the employee may refuse to use or operate the machine or thing or to work in that place."*

What is before the Board, however, is not Mr. McKay's initial refusal, but it is his continuous refusal in the face of the safety officer's ruling, and more precisely, the question of whether there existed, at the time of the safety officer's investigation, a condition which constituted a danger within the meaning of the Code.

As explained at the hearing, the Board's jurisdiction in referral cases is a relatively narrow one. It is, as stated by section 130(1) of the Code:

*"130.(1) Where a decision of a safety officer is referred to the Board pursuant to subsection 129(5), the Board shall, without delay and in a summary way, inquire into the circumstances of the decision and the reasons therefor and may*

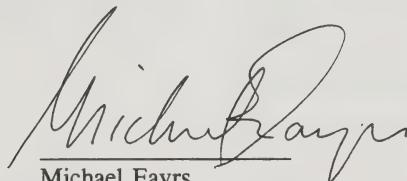
- (a) confirm the decision; or*
- (b) give any direction that it considers appropriate in respect of the machine, thing or place in respect of which the decision was made that a safety officer is required or entitled to give under subsection 145(2)."*

Having heard this matter, I have no reason to doubt Mr. McKay's sincerity with respect to his stated reasons for attempting to avoid asbestos work.

The operative provisions of Part II of the Code, however, simply do not confer on the Board the jurisdiction to resolve what appears to be a matter of work assignment, not one of danger within the meaning of the Code.

Having carefully reviewed the safety officer's investigation report and decision, it is clear that she satisfied herself that Mr. McKay did, in fact, have the requisite training and did have at his disposal the protective equipment necessary to perform the work to which he was assigned.

Accordingly, in all the circumstances of this case, the safety officer's decision is confirmed.



Michael Eayrs  
Member



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## Summary

André Richard, Robert Daudelin and Steve Duclos, *complainants*, and Bunge of Canada Ltd., *respondent*.

Board Files: 745-4640  
745-4641  
745-4643

CCRT/CCRT Decision no. 1063  
Le 12 avril 1994

The case deals with three complaints alleging violation of section 94(3)(a)(i) of the Code.

The employer, Bunge of Canada Limited, reversed the burden of proof by demonstrating that the wheat market was declining along the St. Lawrence and by analyzing the circumstances of each of the complainants. It thus established that the way in which the complainants had been treated was not tainted with anti-union animus, but rather that the decision to terminate their employment was made solely for business reasons.

Consequently, the three complaints were dismissed.

## Résumé

André Richard, Robert Daudelin and Steve Duclos, *plaignants*, et Bunge du Canada Ltée, *intimé*.

Dossiers du Conseil: 745-4640  
745-4641  
745-4643

CCRT/CLRB Décision n° 1063  
le 12 avril 1994

Il s'agit de trois plaintes alléguant violation du sous-alinéa 94(3)a(i) du Code.

L'employeur, Bunge du Canada Ltée, a renversé le fardeau de la preuve en faisant une démonstration de la décroissance du commerce du blé sur le Saint-Laurent et en analysant chacun des cas des plaignants. L'employeur a démontré ainsi que les plaignants n'avaient pas été traités d'une manière imprégnée d'un sentiment antisyndical, mais bien que la décision de les licencier était motivée uniquement par l'intérêt économique de l'entreprise.

Les trois plaintes ont donc été rejetées.



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## Reasons for decision

André Richard, Robert Daudelin and Steve Duclos,

*complainants,*

*and*

Bunge of Canada Ltd.,

*respondent.*

Board Files: 745-4640  
745-4641  
745-4643

Decision no. 1063  
April 12, 1994

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The Board was composed of Mr. Jean L. Guilbeault, Q.C., Vice-Chairman, and Mr. François Bastien and Ms. Véronique Marleau, Members. A hearing was held in Québec on February 1 and 3, 1994.

### Appearances

Mr. Bernard Philion, for the complainants;

Mr. André Johnson, assisted by Mr. Jean-Guy St-Onge, President of Bunge Canada Ltd., for the employer.

These reasons for decision were written by Mr. Jean L. Guilbeault, Q.C., Vice-Chairman.

### The Complaints

André Richard, Robert Daudelin and Steve Duclos each filed a complaint of unfair labour practice, alleging that their employer, Bunge of Canada Ltd., contravened

section 94(3)(a)(i) of the Code. They claimed that their employer dismissed them because of their union activities. The parties were informed at the hearing that the Board would render a single decision in the present files, which it combined for the purposes of hearing and argument. Section 94(3)(a)(i) reads as follows:

*"94. (3) No employer or person acting on behalf of an employer shall*

*(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person*

*(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union, ..."*

André Richard began working for Bunge in December 1980. He was employed as a buyer. Robert Daudelin, who began his employment with Bunge on March 4, 1991, held the position of health and safety manager. Steve Duclos began working for Bunge on September 19, 1989. He was employed as a mechanic foreman.

According to the employer, the positions of the complainants were abolished on July 22, 1993 as part of an internal reorganization. This restructuring was made necessary by a significant decrease, over the last 10 years, in the volume of grain handled. In 1993, this volume fell to a record low of 79 436 077 bushels. The employer added that it had to reduce its operating costs by abolishing the complainants' positions. This situation was not new because, since 1983, more than half of the unionized employees were terminated to protect the employer's business interests.

The complainants, for their part, argued that their employment was terminated because they had participated, between January and July 1993, in the union's campaign to organize the foremen, in respect of whom an application for certification was filed on

September 9, 1993.

The evidence must be analyzed in the light of the provisions of section 98(4) of the Code, which reads as follows:

*"98. (4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party."*

Section 94(3) complaints reverse the onus of proof and place it on the employer. The evidence presented will thus be analyzed in the light of this requirement.

In order to persuade the Board that the decision to abolish positions and to terminate the complainants was not motivated by anti-union animus, the employer made a lengthy presentation on the business, its structure and resources, and the market fluctuations to which the grain trade, and especially wheat, is subject.

The employer handles wheat, which is the property of the Canadian Wheat Board, at its port facilities at Québec. Major construction work, consisting in the building of a winnowing facility, improved significantly the company's capacity. This facility can now receive wheat directly from the Canadian prairies, thereby avoiding the need to process it at the winnowing facility located at the Lakehead at Thunder Bay.

The wheat arrives by laker or train. The handlers unload the wheat into silos, winnow and store it, and reload it aboard ships for export worldwide. The local market is minimal.

Since 1982, the volume of wheat handled by Bunge has been declining: from 210 551 842 bushels in 1983 to 79 436 077 bushels in 1993.

The President of Bunge, Jean-Guy St-Onge, explained in detail the reasons for this decline: newly acquired self-sufficiency in the Common Market countries, and the absence of Russian ships from Québec since the former USSR exhausted its line of credit with Canada for the purchase of wheat and other perishable foodstuffs. A recent study published by the Canadian Wheat Board, entitled "Gearing up for the year 2000," paints a bleak picture of the national outlook in this industry.

A meeting held in March 1993 with the Canadian Wheat Board confirmed the decline of the wheat trade along the St. Lawrence River. Immediately thereafter, a committee composed of President St-Onge, Vice-President Dugal and Executive Assistant Desnoyers, all of whom testified at the hearing and were cross-examined at length by counsel for the complainants, met to examine the steps to be taken, particularly in the area of cost cutting, to cope with this decline in the market. A number of decisions were made at meetings held in March, April, May and June 1993. They included closing the Montréal office (two terminations) and preparing a new organization chart that reflected the new decisions with respect to the position cuts and the termination of six employees, including the three complainants.

The employer then went on to address specifically certain allegations made by the complainants.

André Richard

Complainant Richard, for his part, alleged that he could have filled the newly created position of grain clerk. However, the Board is satisfied that this allegation did not stand up to the questioning of this complainant by counsel for the employer. Mr. Richard's testimony revealed that he had misjudged this position. He admitted that he does not speak English, which is a prerequisite for this position, and that he cannot work with a computer, which constitutes the principal duty of the position.

In view of this uncontradicted evidence, the Board concluded that it could not accept

the complainant's argument that the employer, in terminating his employment, did not take into account his seniority and the company's organizational structure. The complainant's argument that the employer was more concerned with preventing the organizing of its foremen will be examined later. The Board noted that André Richard was not covered by the application for certification seeking to represent the foremen, which was pending before the Board at the time (file 555-3639).

Robert Daudelin

His termination on July 22, 1993 came as a terrible shock to complainant Daudelin. Before he began working for the employer, the foremen in each department handled health and safety matters. The company reverted to this practice following Mr. Daudelin's termination. The complainant relied on the words of encouragement from senior management for reassurance. However, these were simply the usual words of courtesy and kindness. Nothing indicates that they contained any guarantee of job security for the complainant. The Board noted that this complainant did not use his seniority to lay claim to another position and that he was not covered by the application for certification seeking to represent the foremen, which was pending before the Board at the time.

Steve Duclos

A mechanic foreman since 1989, complainant Duclos was covered by the application for certification because he had signed a union membership card on January 25, 1993. He did not use his seniority to claim another position with the company. As "shop foreman," eight persons reported to him. Given the reduced activities, there was less wear and tear on the machinery and fewer breakdowns. In future, his duties would be shared by the maintenance superintendents, Richard Bouchard and André Beaupré, who were to supervise the eight mechanical maintenance employees.

In summary, the employer argued that the committee responsible for analyzing the

situation made the position cuts in stages. First, at weekly meetings held between March and the end of May 1993, the committee did a complete analysis of the company's activities, department by department, before going on to analyze the employees' duties.

The final decisions were made one at a time, in June and July, and communicated to the employees concerned on the date indicated above.

#### Anti-Union Animus

The evidence of anti-union animus is based on isolated facts that we will examine one by one.

#### Promise Not to Terminate Employment

The complainants tried to persuade the Board that there was a change of attitude with respect to the question of termination. As evidence of this, they contrasted the promises made prior to the union organizing campaign with the sudden and unexpected decision of July 22, 1993 to cut eight positions and terminate eight employees, a decision made in the midst of an organizing campaign, a few weeks before the filing of the application for certification in September 1993.

Without giving dates, which is understandable in the circumstances, the complainants cited the numerous remarks of President St-Onge in 1986-87 (during the lockout in the port of Québec), at the Christmas party in 1992, and at a meeting of the employees at the beginning of 1993. These, then, were ordinary meetings between the chief executive officer and his employees. Mr. St-Onge allegedly emphasized motivation, performance and efficiency and allegedly said that there would no layoffs and no position cuts. If these remarks are put in context, the Board cannot conclude that a commitment was made that was binding on the company and that circumstances could not change in the future. The complainants' allegation that the president did not

inform the employees of the existence of the review committee and of its work does not in itself enable the Board to draw any conclusion whatsoever.

Purchase of Homes

The episodes related by the complainants concerning the purchase of homes are not evidence of anti-union animus. The nature of the remarks exchanged and the context of the conversations during which they were made do not enable the Board to draw any conclusion regarding the employer's presumed intention of keeping the complainants in its employ and their claim that the union organizing campaign changed this intention.

The Employer's Conduct at the Time of Termination

The complainants alleged that the fact that a manager accompanied the complainants to their respective offices after they were informed that their employment was being terminated constituted anti-union animus. The Board does not consider such conduct particularly unusual or exceptional in this case. No lengthy explanation is necessary to understand that the complainants experienced a painful shock and that the speed with which they were asked to leave the work place was distressing. However, in the instant case, having regard to the evidence as a whole, this conduct is not indicative of anti-union animus or of a contravention of the Code.

II

Interpretation of the Law

Pursuant to section 98(4) of the Code, the evidence presented with respect to a complaint concerning a dismissal for union activities is considered on the basis of the reverse onus of proof principle.

To refute this presumption, the employer must establish that the termination of employment was not motivated in any way by anti-union-animus.

The interpretation of these provisions of the Code was examined thoroughly in National Pagette (1991), 85 di 1 (CLRB no. 862) (see pages 9-10).

In Air Atlantic Limited (1986), 68 di 30; and 87 CLLC 16,002 (CLRB no. 600), the Board decided this question unequivocally. Where the employer cannot establish, to the Board's satisfaction, that its decision was not influenced by the fact that the employee was about to exercise, or was in the process of exercising, a right conferred by the Code, this decision will be found to be contrary to the Code. The reasons for the termination may very well be valid. Nevertheless, anti-union animus, even where it is incidental to the decision to terminate an employee, compromises the objectivity of this decision and the employer will be found to have committed an unfair labour practice.

Consequently, only disciplinary considerations, in the case of dismissal, and administrative considerations, in the case of a termination, may enter into a decision to terminate an employee's employment:

*"... It is a rare experience for labour relations boards to hear an employer who cannot advance a justification for his act - e.g. failure to report to work one day, an act of insubordination to a superior, or merely a re-evaluation of the employee's performance which showed he did not maintain the standard desired. They may be proper motivations for employer actions but experience shows they are often relied upon around the time the employee is seeking to exercise or has exercised his right under section 110(1) [now 8(1)]. To give substance to the policy of the legislation and properly protect the employee's right, an employer must not be permitted to achieve a discriminatory objective because he coupled his discriminatory motive with other non-discriminatory reasons for his act.*

*For these reasons, if an employer acts out of anti-union animus, even if it is an incidental reason, and his act is one contemplated by section 184(3) [now 94(3)], he will be found to have committed an*

*unfair labour practice.*"

(Yellowknife District Hospital Society et al. (1977), 20 di 281; and 77 CLLC 16,083 (CLRB no. 82), pages 284-285; and 461)

(See also Larose-Paquette Autobus Inc. (1990), 83 di 175 (CLRB no. 840), for other relevant references.)

In this type of case, the employer must satisfy the Board that, in the particular case at issue, its actions were not intended to interfere with an employee's legitimate exercise of a right conferred by the Code and required to be protected by the Board (see Transport Papineau Inc. (1990), 83 di 185 (CLRB no. 842)). In other words, the Board must be satisfied that, even if the reason for the dismissal or termination, as the case may be, is legitimate, it is not a pretext, an excuse or a false pretence that masks anti-union animus (see Les Services Ménagers Roy Ltée (1981), 43 di 212 (CLRB no. 308); and Jacques Lecavalier (1983), 54 di 100 (CLRB no. 443)). If it masks anti-union animus, then the action, whether of a disciplinary or administrative nature, will be set aside because it contravenes the provisions of the Code (in the case of a dismissal, see Pierre Fiset (1985), 55 di 233; and 85 CLLC 16,041 (CLRB no. 473); and A & M Transport Limited (1983), 52 di 69 (CLRB no. 422); in the case of a termination, see Byers Transport Limited (1988), 75 di 164 (CLRB no. 715); and Emery Worldwide (1990), 79 di 150 (CLRB no. 775)). If not, the complaint will be dismissed (in the case of a dismissal, see in particular Canpar (A Division of Canadian Pacific Express Limited) (1981), 43 di 169 (CLRB no. 305); and Amok Ltd. (1981), 43 di 282 (CLRB no. 314); in the case of a termination, see in particular Radio CKML Inc. (1982), 51 di 115 (CLRB no. 398); Canada Post Corporation (1985), 60 di 104 (CLRB no. 504); Québec Aviation Limitée (1985), 62 di 41 (CLRB no. 522); and Robin Hood Multifoods Inc. (1988), 76 di 1 (CLRB no. 718)).

Finally, the Board has no direct authority to examine the validity of the reasons. They are of interest only insofar as they indicate whether or not anti-union animus was present in making a decision (see Verreault Navigation Inc. (1978), 24 di 227

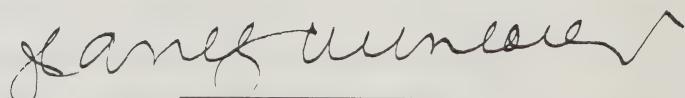
(CLRB no. 134)).

### III

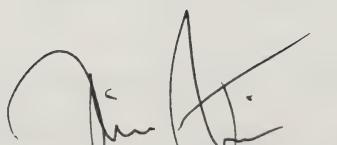
#### Decision

In the circumstances, the Board finds that the employer established that its decision to terminate the complainants was in no way motivated by anti-union animus. The process of reviewing the company's organizational requirements was clearly undertaken at the beginning of 1993, long before the decision to file an application for certification was announced. This process, as revealed by the evidence as a whole, complied with the rules normally followed in these matters, in accordance with a predetermined plan. Contrary to what is often the case where there is a contravention of section 94(3)(a)(i) of the Code, the present terminations did not occur relatively abruptly in the wake of events more or less directly related to and concomitant with a union organizing campaign. The Board is satisfied that these terminations result from a decision based on purely economic considerations and that the employer based its decision to terminate the complainants' employment on objective criteria. The employer thus succeeded in reversing the onus of proof.

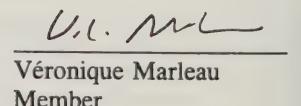
For these reasons, the Board dismisses the three complaints. This is a unanimous decision.



Jean L. Guilbeault, Q.C.  
Vice-Chairman



\_\_\_\_\_  
François Bastien  
Member



\_\_\_\_\_  
Véronique Marleau  
Member

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## Summary

Teamsters Local Union No. 31, *applicant*, and Atomic Transportation System Inc., *respondent*.

Board File: 530-2232

CLRB Decision no. 1064  
May 16, 1994

(Reconsideration of decision issued in certification file 555-3555)

## Résumé

Syndicat des Teamsters, section locale 31, *requérante*, et Atomic Transportation System Inc., *intimé*.

Dossier du Conseil: 530-2232

CCRT Décision n° 1064  
le 16 mai 1994

(Réexamen de la décision rendue dans le dossier d'accréditation 555-3555)

Application for reconsideration pursuant to section 18 of the Canada Labour Code (Part I - Industrial Relations) of a Board decision to dismiss a certification application.

Sitting in plenary session the Board chiefly had to determine if the Board's practice and policy in respect of the factors which it considers in the exercise of its discretion under section 29 of the Code should be expanded to include letters of wishes (or petitions).

Demande de réexamen présentée en vertu de l'article 18 du Code canadien du travail (Partie I - Relations industrielles) à l'égard d'une décision du Conseil rejetant une demande d'accréditation.

Réuni en séance plénière, le Conseil s'est penché surtout sur la question de savoir si ses pratiques et politiques doivent être modifiées afin d'inclure les lettres exprimant les désirs des employés (pétitions) parmi les facteurs dont il tient compte lorsqu'il exerce le pouvoir discrétionnaire que lui confère l'article 29 du Code.



The Board unanimously reaffirmed its long-standing practice in certification applications to ascertain the wishes of the employees by way of membership cards as of the date of the application. The Board also stressed that, although petitions or letters of wishes are brought to the attention of the Board, such information, in the absence of any serious reason for the Board to doubt that the wish of the majority of the employees expressed by the membership cards was freely arrived at, or any other exceptional circumstances, will receive little or no weight.

Le Conseil réaffirme, à l'unanimité, ses pratiques traditionnelles en matière d'accréditation, qui consistent à déterminer les désirs des employés au moyen de vérification des cartes d'adhésion signées à date de la demande. Le Conseil insiste également sur le fait que bien que les pétitions ou lettres qui expriment les désirs d'employés sont portées à l'attention du Conseil, cette information a peu ou pas d'importance, sauf si le Conseil a de sérieux motifs de croire que les désirs exprimés par la majorité des employés, au moyen de signature des cartes d'adhésion, ne l'ont pas été librement ou qu'il existe d'autres circonstances exceptionnelles.

The matter is therefore referred back to the original panel to be disposed of in accordance with the Board's practice and policy.

Par conséquent, l'affaire est renvoyée au bureau initial, afin qu'il la traite selon les pratiques et politiques établies du Conseil.

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## Reasons for decision

Teamsters Local Union No. 31,

*applicant,*

*and*

Atomic Transportation System Inc.,

*respondent.*

Board File: 530-2232

Decision no. 1064

May 16, 1994

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The Board was composed of J.F.W. Weatherill, Chairman; L. Doyon, J.P. Morneault, J.L. Guilbeault, Q.C. and R.I. Hornung, Q.C., Vice-Chairs; C. Davis, M. Eayrs, F. Bastien, M. Rozenberg, P. Shafer, V. Marleau and S. FitzGerald, Members.

### Apearances (on record):

Mr. Don Davies, for the applicant; and

Mr. Barry Y.F. Dong, for the respondent.

These reasons for decision were written by Mr. J. Philippe Morneault, Vice-Chairman.

### I

The Board held a plenary session on December 20, 1993 to examine an application filed on October 4, 1993 by Teamsters Local Union No. 31 (hereinafter the "Teamsters" or the "Union") pursuant to section 18 of the Code to reconsider the Board decision issued on September 13, 1993 in which the Teamsters application for certification in Board file 555-3555 was dismissed.

Following the Board's usual procedure in reconsideration matters where important policy issues are raised (see British Columbia Telephone Company (1979), 38 di 124, [1980] 1 Can LRBR 340; and 80 CLLC 16,008 (CLRB no. 220), and Curragh Resources and Altus Construction Services Ltd. (1987), 70 di 186; 18 CLRBR (NS) 233; and 87 CLLC 16,034 (CLRB no. 640)), a reconsideration panel comprised of Chairman J.F.W. Weatherill and Vice-Chairs J. Philippe Morneau and Richard I. Hornung, Q.C., was appointed to determine whether a plenary session was warranted. This panel determined that it was and, on November 24, 1993, referred the following questions for final disposition to the full Board:

- "1. Is the decision of the original panel in Board file no. 555-3555 one which is in accordance with the practice and policies of this Board?*
- 2. If the answer to the first question is no, should the Board's practice and policy in this regard be expanded to include the additional considerations, if any, relied on by the original panel in exercising its discretion under section 29 of the Canada Labour Code?*
- 3. If the answer to the second question is no, what disposition should be made of this case?"*

In its deliberations, the full Board had before it the complete certification file (555-3555), including the confidential reports, as well as the complete reconsideration file (530-2232), including all submissions filed by the parties.

II

The facts may be briefly summarized as follows. On March 3, 1993, the Union applied for certification to represent a unit of employees of Atomic Transportation System Inc. (hereinafter the "employer"). There were 32 employees in the unit

proposed by the union, and the application was supported by signed applications for membership cards of well in excess of 50% of the members in said unit.

As provided by section 10(2) of the Board's Regulations, the employer was directed by the Board to post in various areas of its premises the "Notice to Employees" to inform the employees that an application for certification had been filed on March 3, 1993. The notice also describes the manner and the time for intervening.

Following that posting, the Board received on March 12 and 15, 1993 a certain number of form letters signed by employees in the unit, expressing their wish not to be represented by the union or a change of mind and requesting a representation vote. However, these employees did not seek intervenor status pursuant to section 12 of the Board's Regulations.

These letters (or petitions) were treated in a confidential manner, in accordance with the Board's practice and section 25 of its Regulations. Consequently, none of the parties was notified of these letters. The employees concerned were informed that their petition (referred to in the acknowledgment letter of the labour relations officer as a "reply") would be referred to the Board for its confidential information and that they would be advised should a hearing be scheduled.

The labour relations officer, following standard procedures, investigated the matter, including the wishes of the employees at the date of application and the appropriateness of the proposed bargaining unit, and forwarded his investigation report to the Board and the parties on May 5, 1993. Part of this report dealing with union support and membership evidence was kept confidential in accordance with section 25 of the Board's Regulations. On June 10, 1993, the Board received a letter from C. Donald MacKinnon, counsel representing the employees who had already requested a representation vote and other employees sharing the same view. Mr. MacKinnon essentially reiterated the request for a representation vote.

On July 5, 1993, the Board panel which dealt with this application determined that the appropriate unit was different from the one sought by the applicant. This had the effect of raising the number of employees in the unit to 42 instead of the 32 sought. (This aspect of the decision was not challenged by anyone.) The panel also decided:

*"Having reviewed all of the documentation on file, the Board has ordered that a representation vote be taken pursuant to section 29(1) of the Code among the employees in the bargaining unit described above in order to ascertain whether or not these employees wish to be represented by Teamsters Local Union No. 31 union."*

On July 19, 1993, the Union applied for reconsideration of that decision, mainly because it did not understand why a vote had been ordered since, by virtue of signed membership applications, it had a majority within the unit, even as expanded by the Board. This first application for reconsideration was dealt with in the regular course by a reconsideration panel of the Board. Unable to determine whether the original decision to order a vote was in fact made in the exercise of the Board's discretion provided under section 29(1) of the Code or in accordance with the mandatory requirement of section 29(2), the reconsideration panel referred the matter back to the original panel in order for it to complete a supplementary confidential review of the membership cards on file, and reach a decision in light of the Board's policy (letter dated August 10, 1993).

On August 20, 1993, the original panel maintained its original decision to order a vote, stating:

*"After having completed a supplementary confidential review of the membership cards on file, the original panel has determined that its decision to order a vote had in fact been based on the discretionary right of the Board contained in Section 29(1) of the Code."*

*The original panel has also determined that its decision to invoke the discretion to order a representation vote was indeed justified by exceptional circumstances contained in confidential information on file, in accordance with the Board's policy with respect to the determination of employee support in certification applications."*

On September 13, 1993, the original panel, on the basis of the results of the representation vote, dismissed the application as it did not receive the support of the majority of the eligible voters who cast ballots. It is this decision, based on the reasoning contained in the letter of August 20 quoted above, which forms the subject matter of this reconsideration application.

### III

Section 28(c) of the Code confers upon the Board the jurisdiction to ascertain the employees' wishes as of the date of the filing of the application or of such other date it considers appropriate.

#### *"28. Where the Board*

- (a) has received from a trade union an application for certification as the bargaining agent for a unit,*
- (b) has determined the unit that constitutes a unit appropriate for collective bargaining, and*
- (c) is satisfied that, as of the date of the filing of the application or of such other date as the Board considers appropriate, a majority of the employees in the unit wish to have the trade union represent them as their bargaining agent,*

*the Board shall, subject to this Part, certify the trade union making the application as the bargaining agent for the bargaining unit."*

Also important is section 23 of the Board's Regulations, which states that membership of an employee in a trade union is evidence that the employee wishes to be represented by the trade union provided that such membership evidence is filed by the trade union in accordance with the conditions set out by section 24 of the Regulations.

Section 29(1) of the Code provides another means to assess employee' wishes.

*"29. (1) The Board may, in any case, for the purpose of satisfying itself as to whether employees in a unit wish to have a particular trade union represent them as their bargaining agent, order that a representation vote be taken among the employees in the unit."*

(emphasis added)

Finally where the trade union, at the date of application, does not have majority support but has the support of not less than 35% of the employees in the unit, then the Board must order a representation vote according to section 29(2), which reads as follows:

*"29. (2) Where a trade union applies for certification as the bargaining agent for a unit in respect of which no other trade union is the bargaining agent, and the Board is satisfied that not less than thirty-five per cent and not more than fifty per cent of the employees in the unit are members of the trade union, the Board shall order that a representation vote be taken among the employees in the unit."*

#### IV

It has been the long-standing practice of the Board in certification applications to ascertain the wishes of the employees by way of membership cards as of the date of the application.

The Board established that practice in Swan River - The Pas Transfer Ltd. (1974), 4 di 10; [1974] 1 Can LRBR 254; and 74 CLLC 16,105 (CLRB no. 8), where it fully canvassed the chaotic labour relations situation likely to arise if the majority status was ascertained at a date other than the date of the application.

*"Once it becomes known that after that deposit date the wish of the employees as expressed by the serious commitment of signing a card, accepting to be bound by a constitution and disbursing monies for union dues can be changed by a number of circumstances and affect the decision of a Labour Board, one will invite a chaotic labour relations situation. For example:*

- 1) *one would be bound to allow the union to pursue an active campaign among the employees in order to add to the list of members already filed in at the date of the Application. This practice is not followed today when the application date is the terminal date and to do so would make for disruption in the labour force.*
- 2) *one would be inviting some employers to go in for outright campaigning against the union aimed at persuading employees to change their minds. Also, one would be tempting some employers to commit unfair labour practices to foster resignations from the Union. This would in turn provoke the unions into active counter-campaigning. All of which creates chaos. One may object here that there are recourses under the law against employers who commit unfair labour practices. But this is of no assistance in the case of a sophisticated campaign where no unfair labour practice is capable of being proven and yet is so very effective in producing a change of mind or wish in the workers.*
- 3) *one would have to tolerate and deal with the intervention of a rival union only too glad to try its luck with an afterthought application filed because of the chaotic situation prevailing after the date of application.*
- 4) *one would have to study the roots of apparently legitimate or contrived substantial changes in the overall complement of employees in the unit after the application date.*

*These are all realities of labour relations: all are disruptive of industrial peace.*

*Of course there are situations where a Labour Board has to ascertain the true wish of the employees by a vote. The obvious one is when it is alleged and eventually proven that the majority status was reached by illegal methods, threats, false representations or fraud vis-a-vis the employees. Then a Board might reject the application or order a vote. Or where new plants are in the process of being staffed a Board may set down criteria for ascertaining when a plant has really become operative. This could mean a vote among employees, including those hired after the date of the application.*

*However, outside of these circumstances, if the date of applications is not determinant and all of the above situations are allowed to develop, a Labour Board might be reduced to ordering votes in almost all cases."*

(pages 16; 261-162; and 883-884; emphasis added)

Therefore, the Board set out its interpretation of sections 126 and 127 of Part V (now sections 28 and 29 of Part I) as follows:

*"It seems to this Board, therefore, that the Legislator established a clear-cut distinction between the circumstances when at the date of the Application the union holds a majority status and the situation where at the same date it does not have majority status.*

*In the first instance the Board must certify and in the second circumstance the Board must order a vote. In both cases the Board must satisfy itself of the wish of the employees.*

*In the first instance without a vote; in the second circumstance by a vote. This is the general rule. The Legislator has left exceptional circumstance to the discretion of the Board and one of them is that even if a union has the majority status at the time of the filing of an application there may be serious reasons for the Board to order a vote in order to make sure that the wish as expressed at the time of the application was regularly, legally and freely arrived at. Upon evidence to the contrary the Board may order a vote.*

*In the present case, as was pointed out above, the Applicant had a majority of the employees as members at the date of the application. There has been no evidence of activities vitiating the arrival at that wish of the majority of the employees."*

(pages 20; 266; and 887; emphasis added)

The general principles and practice established in that decision were followed by the Board until 1977 when the Federal Court of Appeal found that the Board had erred in law in considering that the relevant date for assessing the majority support for a union was the date of application for certification rather than the date of the Board's decision to certify (see CKOY Limited v. Ottawa Newspaper Guild, Local 205, [1977] 2 F.C. 412; (1977), 74 D.L.R. (3d) 229; and 77 CLLC 14,093, at pages 430; 243-244; and 202-203).

In order to minimize the effects of the CKOY judgment, the Board, on March 14, 1977, amended its Regulations by establishing a 10-day period, from the date of posting of the application for certification, in which employees could intervene.

Then, on June 1, 1978, section 126 of the Code (now section 28) was amended to include the words "as of the date of the filing of the application, or of such other date as the Board considers appropriate." By this amendment, Parliament gave the Board clear authority to determine the date on which to assess the wishes of the employees.

These amendments, along with some collateral new CLRB Regulations (sections 26 and 27 of CLRB Regulations, 1978, now sections 23 and 24 of CLRB Regulations, 1992), allowed the Board to resume its established practice of ascertaining employee wishes by way of membership evidence as of the date of the filing of the application for certification.

This practice remains well established and its raison d'être is well documented in many Board decisions (see Canadian Imperial Bank of Commerce, Sioux Lookout (1978), 33 di 432; and [1979] 1 Can LRBR 18 (CLRB no. 158); Provincial Bank of Canada, Roberval (1978), 34 di 633 (CLRB no. 171); Huron Broadcasting Limited (1982), 49 di 68; [1982] 2 Can LRBR 227; and 82 CLLC 16,167 (CLRB no. 378); Sedpex Inc. et al. (1985), 63 di 102 (CLRB no. 543); Alberta Wheat Pool (1991), 86 di 172 (CLRB no. 901); and Delta Bus Ltd. (1992), 88 di 7 (CLRB no. 932)).

Since then, in exercising its discretion under section 29(1), the Board has maintained that it would order representation votes only in special circumstances such as particular raid applications, alleged unfair labour practices, where it suspects that union membership evidence is tainted or irregular, and, very exceptionally, where a considerable amount of time has passed between the date of application and the date of the Board's decision (Murray Bay Marine Terminal Inc. (1983), 50 di 163 (CLRB no. 401), at pages 168-169; see also Sedpex Inc. (1985), 63 di 102 (CLRB no. 543), at pages 112-123).

Only very rarely has the Board departed from such policy and determined that employee wishes ought to be ascertained at another date and through another means than membership evidence. In these cases, the Board, depending on the nature of the irregularities alleged or affecting the membership evidence, has either ordered a representation vote in accordance with section 29(1) of the Code or dismissed the certification application outright.

For example, in Québecair (1978), 33 di 480 (CLRB no. 168), a representation vote was ordered, since factors such as the exclusions, the organizational changes in the company, the high turnover in the unit, and the unascertainable changes in the unit membership, made it difficult to determine employee wishes at the date of the hearing on the basis of information submitted at the time of the application.

In Reimer Express (1979), 38 di 213 (CLRB no. 226), the Board questioned the validity of the membership evidence and warned that attempts to deceive the Board in any fashion would not be tolerated and could be fatal to an application. The Board dismissed the application and stressed the importance attached by the Board to the membership evidence and the documentation supporting it:

*"By virtue of section 126 of the Code, the Board is mandated to place great weight on the wishes of employees as of the date of application as expressed by signed applications for membership complemented by documentary evidence of a monetary commitment. Officers of unions filing such documents are required to attest to their authenticity. In this case, we have evidence of application cards being witnessed by persons who were not present when they were signed. Also, receipts show payment of initiation fees on specific dates, which payment has now been refuted in evidence. This type of conduct cannot be tolerated when the Board relies so greatly on the accuracy of such documents.*

*Persons dealing with the Board are hereby sternly warned to be aware of the importance of membership evidence. Attempts to deceive the Board in any fashion will not be tolerated. Such improprieties may be fatal to an application."*

(page 226)

In Cominco Ltd. (1980), 40 di 75; [1980] 3 Can LRBR 105; and 80 CLLC 16,045 (CLRB no. 240), the Board, after finding minor irregularities in the membership evidence resulting from innocent errors, ordered a vote out of sheer precaution and because of the importance placed on compliance with the Board's Regulations with respect to membership evidence.

A representation vote was also ordered in Verreault Navigation Inc. (1981), 45 di 72 (CLRB no. 325), because, among other things:

*"Reports from the Board's investigation show that there has been considerable turnover of employees since the original date of filing of this application. In addition, even if the Board could do so legally, because the desires of the employees may have been compromised by all the battles, the pressure and various other circumstances in these cases, it cannot settle this question without allowing the members of the bargaining unit, decreed appropriate above, to express freely their desire to choose collective bargaining still, and, if so, to choose the applicant trade union for their bargaining agent..."*

(page 104)

The Board also ordered a representation vote in Crosbie Offshore Services Ltd. (1982), 51 di 120 (CLRB no. 399), because there were two unions involved and because a considerable amount of time had passed between the date of the application and the date of the Board's decision. See also Empire Stevedoring Co. Ltd. (1981), 45 di 36 (CLRB no. 323); and Skeena Broadcasters Ltd. (1982), 49 di 27 (CLRB no. 374), where representation votes were also ordered because of lengthy delays.

In Technair Aviation Ltée (1990), 81 di 146 (CLRB no. 812), the nature of the irregularities, i.e. the failure of certain employees to pay the \$5.00 initiation fee and the falsification of employee signatures on certain membership cards submitted by the applicant union, resulted in the outright dismissal of the application (see also Air West Airlines (1980), 35 di 56 (CLRB no. 231)).

To summarize, although the Board has the discretionary power under section 29(1) to order a representation vote even where the applicant union has demonstrated majority support, it has been the Board's long-standing practice and policy to exercise such discretion only where there are compelling reasons to question the reliability of the membership evidence.

Such policy, which serves the objectives of the Code, ought not to be expanded to include other factors such as the filing of petitions. Indeed, employees' statements of wishes not to be represented by the union or requests for a representation vote are not in themselves sufficient to cast a doubt on the validity of the membership evidence so as to justify a departure from the Board's policy. Although such petitions or letters filed by employees are brought to the attention of the Board, such information, in the absence of any serious reason for the Board to doubt that the wish of the majority of the employees as expressed by the membership cards was freely arrived at, or any other exceptional circumstances, will receive little or no weight.

Finally, it is important to note that these petitions or letters, filed by employees who do not wish to be represented by the applicant union, do not give these employees an automatic right to participate in the certification proceedings or intervenor status (G. Racine et al. (1990), 80 di 1 (CLRB no. 781)). The Board's practice is to grant intervenor status only when the request for intervention, filed in accordance to section 12 of the Board's Regulations, raises questions considered by the Board to be relevant to the exercise of its discretion in accordance with its established policy.

VI

In the instant case, the record, including the Board's decision dated August 20, 1993, does not show on its face any of the special circumstances which would induce the Board to exercise its discretion under section 29(1) and to depart from its long-standing policy.

Consequently, the Board answers the questions as follows:

1. Is the decision of the original panel in Board file no. 555-3555 one which is in accordance with the practice and policies of this Board?

Answer: No it is not.

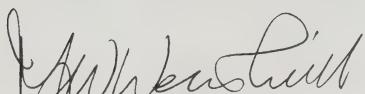
2. If the answer to the first question is no, should the Board's practice and policy in this regard be expanded to include the additional considerations, if any, relied on by the original panel in exercising its discretion under section 29 of the Canada Labour Code?

Answer: No it should not.

3. If the answer to the second question is no, what disposition should be made of this case?

Answer: The file (555-3555) is referred back to the original panel for disposition in accordance with the Board's practice and policy.

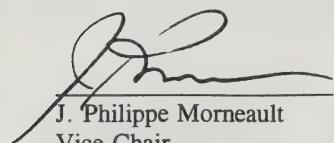
This is a unanimous decision of the Board.



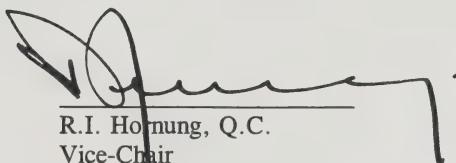
J.F.W. Weatherill  
Chairman



L. Doyon  
Vice-Chair



J. Philippe Morneau  
Vice-Chair



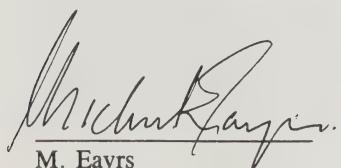
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Vice-Chair



Jean L. Guilbeault, Q.C.  
Vice-Chair



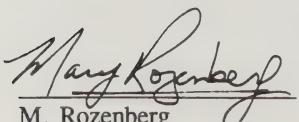
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Member



M. Eayrs  
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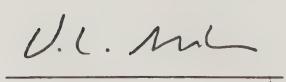
F. Bastien  
Member



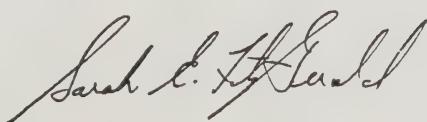
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## Summary

Society of Ontario Hydro Professional and Administrative Employees, *applicant*, Ontario Hydro, *respondent*, and Power Workers' Union, CUPE Local 1000, *intervenor*.

Board File: 555-3662

CLRB/CCRT Decision no. 1065

May 27, 1994



## Résumé

Société des employés professionnels et administratifs de Ontario Hydro, *requérante*, Ontario Hydro, *intimée*, et Power Workers' Union, section locale 1000 du SCFP, *intervenant*.

Dossier du Conseil: 555-3662

CLRB/CCRT Décision n° 1065

le 27 mai 1994

This case deals with an application for certification that was filed pursuant to section 24 of the Code.

The Board found the application timely; that the applicant had status as a trade union; delineated an appropriate bargaining unit and decided to issue a certificate.

The Board found that the application was timely under section 24(2)(a) of the Code as no collective agreement was in force at the time of the application. The Board ruled that the agreement entered into between the parties does not constitute a voluntarily recognized collective agreement since clause 8 of the agreement provides specifically that it was not intended to be a collective agreement within the meaning of the Code nor a bar to an application for certification. This clause which makes recognition of a bargaining agent conditional on constitutional jurisdiction was found not to be against federal public policy.

La présente affaire porte sur une demande d'accréditation qui a été présentée en vertu de l'article 24 du Code.

Le Conseil a jugé que la demande est recevable; que le syndicat requérant répond au statut d'agent négociateur; a déterminé l'unité habile à négocier et a émis une ordonnance d'accréditation.

Le Conseil estime que la demande a été présentée dans les délais prescrits, aux termes de l'alinéa 24(2)a) du Code, puisqu'il n'y avait pas de convention collective au moment de la présentation de la demande. Il juge que la convention conclue par les parties ne constitue pas une convention de reconnaissance volontaire, parce que la clause 8 de la convention prévoit précisément qu'elle ne constituait pas une convention collective au sens du Code ni un obstacle à une demande d'accréditation. Le Conseil estime que cette clause, qui assujettit la reconnaissance d'un agent négociateur à la compétence constitutionnelle, ne va pas à l'encontre de la politique du gouvernement fédéral.

The Board found that the line of business of Ontario Hydro Nuclear (OHN) falls under federal jurisdiction in accordance with a recent Supreme Court of Canada ruling. The Ontario Hydro Nuclear business constitutes a single functioning unit and cohesive going concern within the definition of a work declared to be for the general advantage of Canada.

Although it was argued by the intervenor that a number of positions included in the applicant's proposed bargaining unit fall within the bargaining unit for which the intervenor is a voluntarily recognized bargaining agent, the Board found that there was no conflict between the definition of the bargaining unit for which the intervenor is bargaining agent and that of the applicant and concluded that those disputes will be best resolved through the arbitration process. The Board also concluded that the resolution of the disputed positions would not affect the clear majority of employees represented by the applicant.

Le Conseil juge que l'entreprise d'Ontario Hydro Nuclear relève de la compétence fédérale en conformité avec un récent jugement de la Cour suprême du Canada. Cette entreprise constitue une unité de fonctionnement et une entreprise active responsable au sens d'entreprise déclarée être à l'avantage du Canada.

Bien que l'intervenant prétende qu'un certain nombre de postes inclus dans l'unité de négociation proposée par la requérante font partie de l'unité pour laquelle il est l'agent négociateur reconnu volontairement, le Conseil juge qu'il n'y a pas de conflit concernant la composition de l'unité de négociation pour laquelle l'intervenant est l'agent négociateur et la composition de l'unité de la requérante. Le Conseil conclut que ces conflits seraient mieux résolus par le truchement du processus d'arbitrage et que la résolution de la question des postes en litige ne toucherait pas la grande majorité représentée par la requérante.

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## Reasons for decision

Society of Ontario Hydro Professional and Administrative Employees,

*applicant,*

*and*

Ontario Hydro,

*respondent,*

*and*

Power Workers' Union, CUPE Local 1000,

*intervenor.*

Board File: 555-3662

Decision no. 1065

May 27, 1994

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The Board was composed of Mr. J.F.W. Weatherill, Chairman, and Messrs. Calvin Davis and Michael Eayrs, Members. A hearing was held on May 9, 11 and 13, 1994, at Toronto.

### Appearances

Mr. James K.A. Hayes, for the applicant;

Ms. Judith Clarkson, for the respondent; and

Mr. Christopher M. Dassios, for the intervenor.

These reasons for decision were written by Mr. J.F.W. Weatherill, Chairman.

This is an application for certification in respect of a unit of employees of Ontario Hydro, employed in or in connection with those nuclear facilities coming under section 18 of the Atomic Energy Control Act. At the outset of the hearing in this

matter, counsel were asked to deal with the question of timeliness of this application, and were advised as well that as this was the first occasion on which the applicant Society had made an application to the Board, its status as a trade union would have to be considered. Counsel addressed the question of timeliness, but did not comment on the matter of the applicant's status as a trade union.

After taking time for consideration, the Board issued the following ruling, on May 9, 1994:

*"Section 24 (2) of the Canada Labour Code provides that:*

*'subject to subsection (3) [which does not apply to this case] an application by a trade union for certification as the bargaining agent for a unit may be made*

*(a) where no collective agreement applicable to the unit is in force and no trade union has been certified under this Part as the bargaining agent for the unit, at any time; ...'"*

*In the instant case, the Board has now examined the material filed relating to the status of the applicant, and finds that the applicant Society is a trade union within the meaning of the Canada Labour Code. It is the case that no trade union has been certified under Part I of the Code as the bargaining agent for the unit of employees for which certification is sought. We have been concerned, however, by the existence of a document which has at least many of the attributes of a collective agreement, and which is indeed described in the investigating officer's report in this matter as being a collective agreement in effect between the applicant and the respondent, from January 1, 1993 to December 31, 1994. If this document constitutes a collective agreement in force at the time this application was made, that is on October 14, 1993, then this application would be untimely, having regard to section 24(2)(c) of the Code, which provides that an application for certification may be made:*

*'(c) where a collective agreement applicable to the unit is in force and is for a term of not more than three years, only after the commencement of the last three months of its operation; ...'*

*The agreement in question, however, was entered into on the express assumption that labour relations between the parties in respect of this unit of employees was governed by the Ontario Labour Relations Act. The parties were, however, aware that that assumption might prove incorrect, and were awaiting a decision of the Supreme Court of Canada on the question. That decision has since come down and it is now clear, and was clear at the time the application was made, that employees - or some of them - in the bargaining unit do come under federal jurisdiction, and that labour relations in respect of such employees are governed by the Canada Labour Code.*

*The parties very clearly turned their minds to the possibility that the stated assumption of provincial jurisdiction might prove incorrect, and they provided, in clause (b) of the third paragraph of article 8 of the collective agreement that:*

*'(b) this Agreement is not intended by the parties to constitute a voluntary Collective Agreement nor a voluntary recognition agreement of any kind pursuant to the Canada Labour Code with respect to employees who may subsequently be confirmed as being governed by the Canada Labour Code; ...'*

*And they further agreed in clause (c) of that paragraph that*

*'(c) this Agreement will not be raised by the parties as a bar to any application for certification which may subsequently be made by the Society during the life of this Agreement.'*

*Neither the parties to the agreement nor the intervenor have sought to raise the agreement as a bar. In this respect, however, the parties cannot 'contract-out' of the provisions of the Code and if the situation contemplated by section 24(2)(c) is in fact the situation here, then this application would have to be dismissed as untimely. This Board's jurisprudence to that effect is clear, and we would not depart from it.*

*In our view, however, it cannot now be said that there is in effect a collective agreement between the applicant and the respondent covering employees coming within federal jurisdiction, that is, whose labour relations are governed by the Canada Labour Code. That is because there was, very explicitly, no voluntary recognition of the applicant as bargaining agent for such persons, and the agreement which was made very explicitly did not apply to them.*

*The parties, it is clear, sought to leave themselves unfettered in respect of the application of the Code. That collective agreement would not have acted as a bar to any application by any trade union in respect of federal employees.*

*The Society sought to rely on the agreement in an application to the Ontario Labour Relations Board in Ontario Hydro, [1990] OLRB Rep. March 305, at page 325. The Ontario Labour Relations Board found that 'the Society is estopped from claiming that the 1983 Master Agreement and subsidiary agreements constitute a collective agreement under the Act.' That estoppel was based, to put the matter generally, on clauses (b) and (c) of the third paragraph of article 8 of the agreement, which we have set out above. The Ontario Labour Relations Board considered that those provisions were not against public policy, at least not the public policy expressed in the Ontario Labour Relations Act. In our view, they are not against federal public policy, as expressed in the Canada Labour Code, either. That recognition of a bargaining agent be conditional on constitutional jurisdiction is not, we consider, in any way improper. Under the Canada Labour Code, as under the Ontario Labour Relations Act, a trade union does not have a statutory right to an employer's 'voluntary recognition'. As the Ontario Labour Relations Board said at paragraph 57 of its Ontario Hydro decision, *supra*, that phrase would be a contradiction in terms if it were otherwise.*

*While it may be that we would, in eventual reasons for decision in this case, elaborate on what we have said, it is our view, in the circumstances of the particular case, that this application is one which is properly before us under section 24(2)(a) of the Code."*

We now confirm that ruling. The applicant is a trade union within the meaning of the Canada Labour Code. This application is a timely one.

Counsel then addressed the question of the scope of this Board's jurisdiction over the employees covered by this application. The Board's ruling in that respect was given on May 13, 1994, and is as follows:

*"This is an application for certification for a unit described in the application as follows:*

*'All employees employed by Ontario Hydro on or in connection with works which by section 18 of the Atomic Energy Control Act have been declared to be works for the general advantage of Canada, as supervisors, professional engineers, engineers-in-training, scientists, professional, administrative employees, foremen, and associated employees, including regular, probationary, graduate students, reduced-hours and temporary employees, save and except:*

- a) those persons who perform managerial functions as distinct from supervisory employees;*
- b) employees who are primarily employed in a confidential capacity affecting the terms and conditions of employment for Ontario Hydro staff;*
- c) employees whose full-time duties are security work;*
- d) employees in bargaining units for which any trade union holds bargaining rights.'*

*In the investigating officer's report in this matter, it is noted that the parties have agreed on a bargaining unit consisting, with exceptions similar to those noted, of:*

*'All employees employed by Ontario Hydro in Ontario Hydro Nuclear (OHN) or its successor organization in accordance with Section 18 of the Atomic Energy Control Act in the Province of Ontario as supervisors, professional engineers, engineers-in-training, scientists, professional, administrative and associated employees. ...'*

*In the recent case of Ontario Hydro v. Ontario (Labour Relations Board), [1993] 3 S.C.R. 327; and (1993), 93 CLLC 14,061, the Supreme Court of Canada, in a majority decision, determined that the Canada Labour Code does apply to employees of Ontario Hydro who are employed on or in connection with those nuclear facilities that come under section 18 of the Atomic Energy Control Act. Since that decision, Ontario Hydro, in the course of considerable restructuring, has established a "line of business" known as Ontario Hydro Nuclear (OHN), which we would describe as a clearly definable corporate structure, dedicated to the operation of Ontario Hydro's nuclear facilities. The OHN divisions include plant sites at which electricity is generated by nuclear power as well as dedicated off-site*

*operations in the nature of design, control and monitoring, training and general administration. All these support operations are almost entirely related to OHN, and not to other Ontario Hydro operations.*

*The applicant, the respondent and the intervenor all agree that OHN constitutes a federal work or undertaking, and that the labour relations involving OHN employees are governed by the Canada Labour Code.*

*This Board is in agreement. There is apparently no doubt that that conclusion is consistent with the reasoning of three of the majority judges, expressed in the reasons of La Forest, J. There is nothing in the dissenting opinion, expressed by Iacobucci, J., to suggest that, if any employees of Ontario Hydro should be found to come under the Canada Labour Code, the line of demarcation for inclusion within the scope of the Code should be anything other than that of employment within OHN (although, of course, OHN did not exist at the time material to the case). That is to say, we see nothing in the reasons either of La Forest, J., or Iacobucci, J., to suggest that the bargaining unit we have suggested here would be inconsistent with anything in those reasons.*

*In the reasons for judgment given by the Chief Justice, we can read:*

*'... In his affidavit, Arvo Niitenberg, Ontario Hydro's Senior Vice-President of Operations, explains that generating electricity requires a source of energy, a turbine, and a generator. The source of energy at nuclear facilities is a nuclear fission reaction, which generates heat energy, which is then used to turn water into steam. That steam drives the turbine, which spins the generator, which produces the electricity by means of an electromagnet and wire coils. The affidavit makes it clear that, once the steam is produced, there is no difference between thermal (i.e., fossil-fuel) and nuclear electrical generation. Although I would leave it to the Ontario Labour Relations Board to exclude those particular employees from its jurisdiction who are covered by the Canada Labour Code, in general terms I am of the view that it is only those employees involved in the first of the three parts of the generation phase who would be federally regulated. ...'*

(pages 355-356; and 12,371)

*According to the evidence before us, the line of business conducted by OHN comprises one single functioning unit. This functioning unit, dedicated to the production of electricity by nuclear power, constitutes, we find, a "nuclear*

*business"; each of its divisions, whether involved in the actual production of electricity by nuclear power, or in the various technical and administrative tasks related to such production, forms part of a cohesive going concern. What takes place in any division has a direct bearing on the nuclear business.* It is significant that, on the evidence, the operation and maintenance of turbines and generators form part of a cohesive system, and that work on this system, as such, is subject to the control and requires the approval of the Authorized Nuclear Officer. Considered, then, "in its functional character" (see Laskin's *Canadian Constitutional Law* (5th ed. 1986), vol 1, at p. 629, cited by La Forest, J., in *Ontario Hydro v. Ontario Labour Relations Board*, *supra*, at pages 363; and 12,341) the "work" declared to be within federal authority is, in the present state of things, the operations of OHN. The "work" includes its appropriate management aspects: see *Canadian Pacific Railway Co. v. Corporation of the Parish of Notre Dame de Bonsecours*, [1899] A.C. 367, at pages 372-373, cited by La Forest, J., at pages 363; and 12,341 of his opinion. For us to arrive at a different conclusion on the facts of this case would be to interpret the constitution in a "disintegrating fashion", something against which Beetz, J., warned in *Montcalm Construction Inc. v. Minimum Wage Commission et al.*, [1979] 1 S.C.R. 754; and (1978), 93 D.L.R. (3d) 641, at pages 658; and 776.

*The five OHN divisions which are not situated at actual nuclear generating sites nevertheless form, on the evidence, part of one single functioning unit. They should not be said to constitute "fringe" operations. Even if they were to be so described, it is our view, on the uncontradicted evidence, that they constitute essential, integral parts of the operation and management of the federal work.*

*Our view in this respect is consistent with the recent decision of the OLRB in the case of Eugene Kalwa, no. 3308-93-U, March 25, 1994, in which that Board found that an assistant technical supervisor in the Inspection and Maintenance Department of the Central Production Services Division, Production Branch, Ontario Hydro, was in respect of his employment relationship governed by the Canada Labour Code. The OLRB found that the work done "in office" by the employee in that case was 'as critical to the core activity - the production of nuclear energy - as that which he would perform within the nuclear stations.'*

*For the foregoing reasons, we conclude that the appropriate bargaining unit in this case will be a unit of employees of OHN."*

We now confirm that ruling. The employees of Ontario Hydro employed at "Ontario Hydro Nuclear", including all employees covered by this application, are subject, in respect of labour relations, to the Canada Labour Code.

Counsel then addressed the matter of the determination of the unit of employees appropriate for collective bargaining. Having regard to the agreement of the parties, to the material set out in the report of the investigating officer, and to all of the circumstances of the case, the Board finds that the following constitutes a unit of employees appropriate for collective bargaining:

*"All employees of Ontario Hydro Nuclear in the Province of Ontario employed as supervisors, professional engineers, engineers-in-training or scientists, and professional, administrative and associated employees, save and except persons employed in a confidential capacity with respect to labour relations; persons whose full-time duties are security work; and persons in bargaining units for which any trade union holds bargaining rights."*

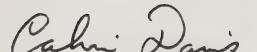
The Board is satisfied, on examining the confidential evidence of membership, that the applicant Society represents a majority of the employees in the bargaining unit described above. Accordingly, a certificate will be issued to the applicant.

The Board is aware that there are a number of positions in respect of which there is a question whether they fall within the bargaining unit for which the applicant Society hereby becomes the bargaining agent, or the unit of employees for which the Power Workers' Union (CUPE Local 1000) is bargaining agent. There is apparently no conflict between the definition of the bargaining unit for which the Power Workers' Union is the voluntarily recognized bargaining agent and that of the bargaining unit for which the applicant Society is hereby certified. There are disputes with respect to the inclusion or exclusion of certain individuals. Those disputes, we consider, are best resolved by the arbitration process which, in some cases, has already begun. It is clear to us that whatever the outcome of these disputes, the applicant represents a

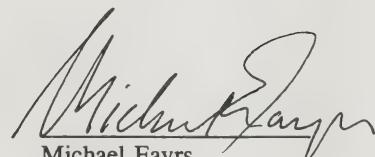
clear majority of employees in the bargaining unit.



J.F.W. Weatherill  
Chairman



Calvin Davis  
Member of the Board



Michael Eayrs  
Member of the Board

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